

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF DAYHILL, LLC

Petitioner

Chris Commarota

Milena Mattingly

Garrett Mattingly

Philip Mitchell

Mickey Cornelius

Victoria Bryant

James W. Hendricks

For the Petitioner

Martin J. Hutt, Esquire

Attorney for the Petitioner

Martin Klauber, Esquire, People's Counsel

Opposed to the Petition

Peter Zara and Janice Walden, individually

and on behalf of the Beacon Place HOA

Lorena Ramirez

Dallas Thomason

Dolores Ustrell

Opposed to the Petition

Before: Martin L. Grossman, Hearing Examiner

Board of Appeals No. S-2710
(OZAH Referral No. 08-9)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

On August 20, 2007, Petitioner, Dayhill, LLC., filed Petition S-2710 for a special exception to permit construction and operation of a Child Day Care Center (the Kiddie Academy) to be built on the R-200 zoned portion of Parcel A, Block C, Bel-Pre Manor Subdivision, located at Bonifant Road and Catoctin Drive, in Silver Spring, Maryland. The initial application would have allowed up to 153 children on site, and that number was increased to 158 by the time it was reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) and by the County Planning Board. However, in order to address some of the concerns raised by the community at the OZAH hearing, Petitioner subsequently reduced that figure to a maximum of 138 children on site, and the number of staff on site would be limited to 23 full-time equivalents. Exhibit 223(a).

The property is part of a larger (3.07 acre) tract (Tax Account No. 13-01538212) owned by Sandy Spring Bank, which has a branch on the portion of the tract it will retain. The larger tract is split zoned C-T and R-200. On October 4, 2006, Sandy Spring Bank contracted to sell approximately 1.85 acres of the tract (the eastern portion, adjacent to Catoctin Drive, which is zoned R-200) to Baron Investments, LLC, with settlement pending approval of the special exception. Exhibit 9. On March 1, 2007, Baron Investments, LLC assigned all of its interest in the contract to Petitioner, Dayhill, LLC. Exhibit 9.

If the special exception is approved, Petitioner plans to lease the property to a child daycare provider, AMG, LLC, run by Milena and Garrett Mattingly, who will operate the facility under a franchise from Kiddie Academy. Exhibit 3 and 10/23/09 Tr. 76.

On September 25, 2009, the Technical Staff filed its Report (Exhibit 119)¹, which recommended approval of the petition, with conditions. The Montgomery County Planning Board reviewed this case on October 8, 2009, and unanimously recommended approval of the petition, with

¹ The Technical Staff Report is frequently quoted and paraphrased herein.

conditions and suggestions for the Board of Appeals, which will be discussed later in this report. Memorandum dated October 15, 2009 (Exhibit 126).

The petition is strongly opposed by the community. Approximately 77 letters in opposition were filed,² and the Beacon Place Homeowners Association (BPHOA) participated vigorously (and very effectively) in opposition before, during and after the six days of hearings.

The hearing was initially scheduled for December 17, 2007 (Exhibit 11), but it was postponed a number of times at the request of the Petitioner (Exhibits 20, 22, 23, 105 and 106) and once because Petitioner's traffic study was submitted too late for review by Technical Staff. Exhibit 102. The petition was amended a number of times, and a new hearing date was noticed for September 25, 2009. Exhibit 108. At the request of the Beacon Place Homeowners Association (BPHOA), the hearing was postponed again for one month, until October 23, 2009. Exhibit 115.

The hearing was begun, as scheduled, on October 23, 2009. Additional sessions were held on November 20, 2009, January 15, 2010, January 22, 2010, April 9, 2010 and May 21, 2010.³

On April 28, 2010, prior to the final hearing date, Petitioner filed the following revised plans and documents, attached to Exhibit 223, based on developments to that point in the hearing:

- Exhibit 223 (a) April 28, 2010 Revised Statement of Operations
- Exhibit 223 (b) Land Planning Report, dated August 26, 2009
- Exhibit 223 (c) Revised Distance Exhibit to reflect reduction in the proposed building footprint
- Exhibit 223 (d) Revised Site Plan drawing
- Exhibit 223 (e) Revised Landscape Plan (sheet 1 of 3)
- Exhibit 223 (f) Revised Landscape Plan (sheet 2 of 3)
- Exhibit 223 (g) Revised Landscape Plan (sheet 3 of 3)

These exhibits, together with the following ones, represent the final plans in the case:

- Exhibit 116(g): Revised Preliminary Forest Conservation Plan (PFCP)
- Exhibits 129, 170, 196 and 197: Affidavits of Compliance from Dayhill, LLC and the Mattinglys, who will run the daycare operator, AMG, LLC

² The vast majority of the opposition letters consist of a form provided by BPHOA and completed by individual residents of the neighborhood. The form letter provides boxes to check off the issues of concern and space for individual comments.

³ There were six hearing dates. The transcripts are denoted by the date of the referenced session. For example, a reference to the hearing on April 9, 2010, would be labeled "4/9/10 Tr. xx."

Exhibit 136: Outdoor Play Schedule
Exhibit 138: Exterior Elevations
Exhibit 139: Signage Plan
Exhibit 140: Colored Rendering of Proposed Building
Exhibit 148(e) and (f): Revised Lighting and Photometric Plans
Exhibit 148(g): Illustrative Cross-Sections Plan
Exhibit 158(b): Community Liaison Committee Plan
Exhibit 195: October 22, 2009 Planning Board Approval of Revised PFCP
Exhibit 209(g): Revised Transportation Management Plan (TMP)
Exhibit 217: Projections of Parking and Parents Pick-Ups and Drop-Offs
Exhibit 219(a) and (b): Revised Cross-Sections
Exhibit 232(a): Revised Floor Plan

Technical Staff reviewed revisions in various plans and approved changes with regard to impact on transportation facilities (Exhibit 166); propriety of the revised lighting plans (Exhibit 165); appropriateness of granting a requested parking waiver (Exhibit 208); and advisability of the revised TMP (Exhibit 224).

The final day of hearings was held on May 21, 2010, and the record closed on June 1, 2010. It was reopened on October 15, 2010, to receive a revised floor plan (Exhibit 232(a)), which had been described during the hearing but not filed at that time. 4/9/10 Tr. 9-10. Since the change was described at the public hearing, and the opposition indicated it had no comments regarding the revised floor plan (Exhibit 233), the record re-closed on October 15, 2010. Exhibit 234.

The review of this case was complicated by an underlying legal issue raised initially by BPHOA during the first day of the hearing – whether the requested use should be characterized as a daycare facility, which is what is petitioned, or a private educational institution (PEI), or both. This issue is discussed at some length in Part IV.A. of this report. It is a threshold question because the two types of special exception do not have precisely the same requirements. As will appear more fully in the later discussion, the Hearing Examiner concludes that this petition could properly be filed under the child day care special exception provisions, although it is a close question.

The Hearing Examiner also concludes that the neighbors have raised some legitimate concerns, but they do not warrant denial of the subject petition. They do warrant the imposition of

special conditions, including retention of Board jurisdiction to monitor impacts, an initial reduced-enrollment study period, additional traffic studies, a Transportation Management Plan to limit any potentially adverse effects and a community liaison council.

II. FACTUAL BACKGROUND

A. The Subject Property

The subject site is the eastern portion (1.85 acres) of a 3.07 acre tract of land located on the south side of Bonifant Road, between Layhill Road, on the west, and Catoctin Drive, on the east, in Silver Spring. The overall tract is identified on the plat records as Parcel-A, Block C, Bel-Pre Manor Subdivision, and it is currently split zoned R-200 and C-T. The western portion of the property, which is zoned C-T, consists of 1.22 acres and is currently improved with a bank building. The R-200 zoned, eastern portion of the property is the subject site of the proposed special exception; it consists of approximately 80,802 square feet of land and is unimproved. Subdivision will be required if the special exception is approved. The site is depicted below in an annotated aerial photograph from the Technical Staff report, which also shows the zoning in the area (Exhibit 119, p. 6):



Photographs of the site were attached to Petitioner's Land Planning Report (Exhibit 223(b)) and to the Technical Staff report (Exhibit 119):



Figure A.2

The R-200
portion of
the site as
viewed
from
Bonifant
Rd.



Figure A.3

The C-T
portion of
the site as
viewed
from
Bonifant
Rd.

According to Technical Staff, the property contains 0.89-acres of forest on site and nine large or specimen trees. There is also a small pocket of remnant wetlands on-site with associated buffers; however, Technical Staff did not indicate that the site is within a special protection area or a primary management area. Exhibit 119, p. 10. The heavily forested area is in the southern part of the property, as can be seen on the aerial photo, below, provided by BPHOA (Exhibit 182). The photo contains a good overview of the site and its immediate environs:



Petitioner's Land Planning Report (Exhibit 223(b), p. 5) indicates that the topography of the property falls gradually from the northwest corner toward the southwest corner of the property along Catoctin Drive for the first 275 feet, before falling rather steeply at 20%, and then rising again toward the southern boundary of the property. Current access to Sandy Spring Bank is accomplished through curb cuts on the eastern side of Layhill Road and the southern side of Bonifant Road.

The Bank has refused to allow access to the special exception site from Layhill Road across its property (Exhibits 222 and 229), and therefore new curb cuts would have to be made on Catoctin Drive to serve the proposed day care center. 4/9/10 Tr. 152-159 and 5/21/10 Tr. 7-16. The inability of the special exception site to obtain access from Layhill Road has created one of the major issues in this case – the impact on the adjacent Beacon Place Community, whose sole vehicular access to the world is through Catoctin Drive, the roadway that would serve the proposed daycare center. Below, the intersection of Bonifant Road and Catoctin Drive is depicted, with the subject site in the background. Much of the controversy in this case surrounds the question of traffic at this intersection.



Figure A.1 the site as viewed from the intersection of Bonifant Rd. and Catoctin Dr.

B. The Neighborhood

Technical Staff proposed to define the neighborhood (Exhibit 119, pp. 6-7), as bordered on the north by the Argyle Country Club and Ballows Way; on the east by a townhouse development in the R-60 zone and the R-200 Zoned single-family dwellings along the east side of Bonifant Road; on the south by Queensguard Road and the southern boundary line of the PD-7 Zoned townhouse development; and on the west by the Argyle Middle School (the Western boundary of the PD-7 zoned townhouse development) and Sun Valley Circle. The neighborhood, as so defined, is reproduced from the Staff report (Exhibit 119, p. 7):



Technical Staff described the neighborhood (Exhibit 119, p. 7) as:
generally characterized by a mixture of residential homes, retail and office uses, and

institutional uses. The mix of uses include townhomes in the RT 12.5 and PD-7 zones; single-family dwellings and a church in the R-200 zone; gas stations, a McDonald's restaurant, retail shops and offices in the two strip malls along the north side of Bell Pre/Bonifant Road in the C-1 and O-M zones; and banks in the C-T and C-1 zones.

Petitioner's land planner, Victoria Bryant, agreed with Technical Staff's definition of the boundaries of the general neighborhood, and the Hearing Examiner accepts this definition of the neighborhood. Ms. Bryant described the general neighborhood as including a mix of uses, with the Sandy Spring Bank on the corner, two C-1 commercial strips (to the northwest and north, across Bonifant), a PD-7 townhouse development, a school, and residential communities in the southwest, southeast and northeast. Some single family homes and the Beacon Place townhouse development are just to south and east of the subject site 10/23/09 Tr. 227.

Photographs of the neighborhood from the Staff report are shown below and on the following page. The four below show the nearby residential development:



Figure A.6
An R-200
zoned lot
adjacent to
the site on
Catoctin
Drive.



Figure A.15
Beacon Hill
Community
Entrance sign



Figure A.16
Townhomes
in the Beacon
Hill
Community
closest to
proposed
Daycare.



Figure A.19
Traffic
Circle at
end of
Catoctin
Terrace

Commercial uses located to the north of the site, across Bonifant Road, are depicted below:



Figure A.11
Looking
toward the
northwestern
side of the
intersection
of Layhill Rd
and Bonifant
Rd.



Figure A.10
Office and
commercial
uses on the
O-M zoned
area north
of the site
on Bonifant
Rd.



Figure A.12
A portion
of the C-1
zoned Plaza
del
Mercado



Figure A.14
Commercial
uses in the
C-1 area
north of the
intersection
of Layhill
Road and
Bonifant Road

C. The Master Plan

The subject site is located within the area covered by the 1994 Aspen Hill Master Plan. The Aspen Hill Master Plan contains a general discussion of special exceptions (pp. 80-81) and some general recommendations for the design of child care facilities (pp. 195-196), but most importantly it has specific recommendations for the subject site, which is identified as Site No. 11 in the Plan's listing of significant parcels (pp. 56-59). This portion of the Master Plan is quoted in full, on the next page, along with the diagram of the area shown on page 58 of the Master Plan.

11 *Sandy Spring Bank*

The 3.06-acre property is located in the southeast corner of the intersection of Layhill Road and Bonifant Road (Figure 20). This is the crossroads for the major activity center for the Layhill Community. It is bordered by single-family detached houses on 20,000-square-foot and 6,000-square-foot lots to the east and south. Currently, approximately 0.68 acres are zoned C-1 and the remainder is zoned R-200.

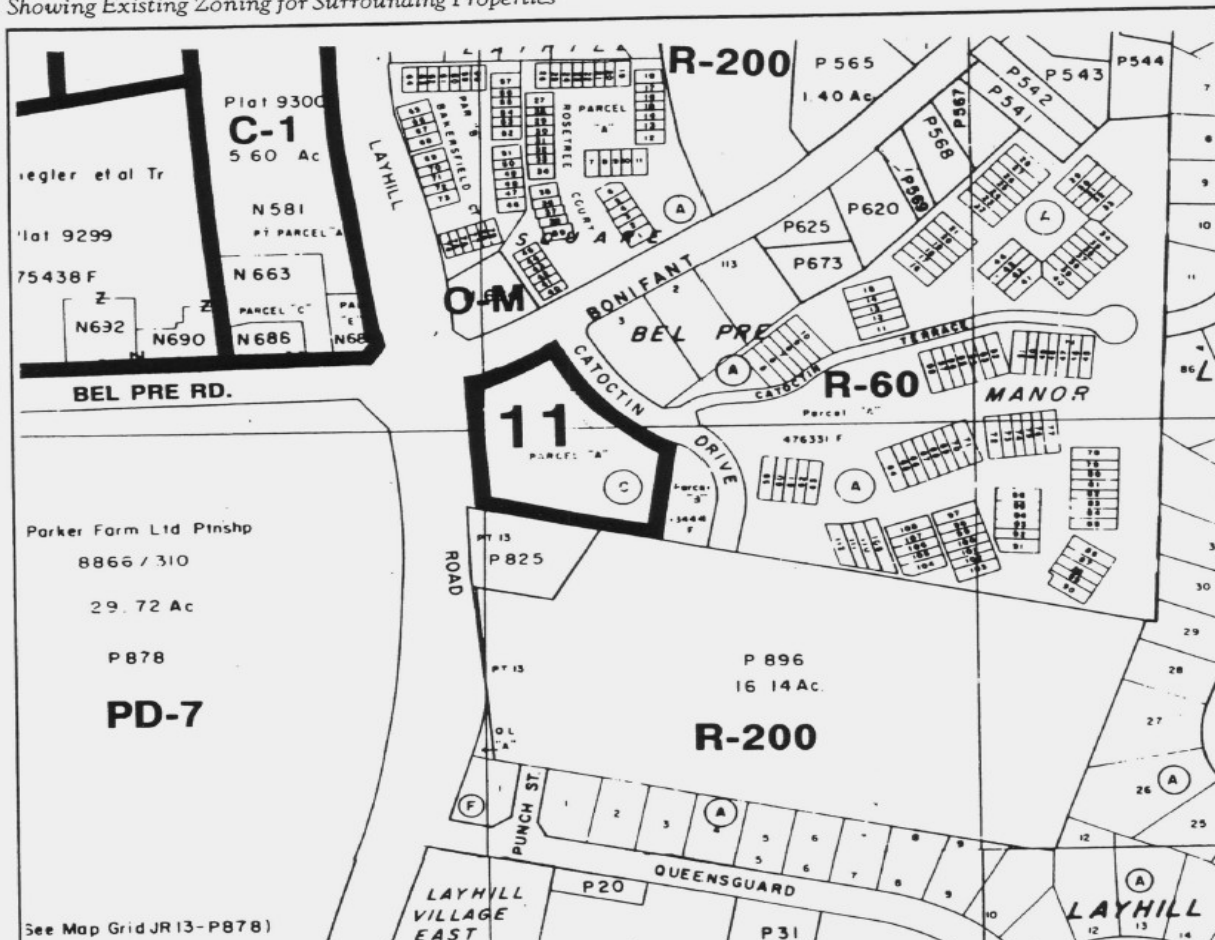
In the 1970 Aspen Hill Master Plan, the development proposal for this site was shown in the urban design study sketch. This site was recommended as a future library. This site is recommended for an expansion of the existing commercial designation to 1.22 acres of C-T zoning. The remainder to the property should be kept in the R-200 zone. In addition, this Plan would support a special exception on the R-200 portion of the site for a day care center. When this site is redeveloped, the existing trees on the southern portion of the property should be retained, as much as possible.

The site should have access onto Catoctin Drive to provide improved access onto Bonifant Road in either direction. The present access point is very close to the intersection of Bonifant and Layhill Roads. If a median break is installed on Bonifant Road, then traffic into the bank would be limited to right-in and right-out traffic only on Bonifant Road. [Emphasis added.]

Figure 20

SIGNIFICANT PARCELS & AREAS SITE NO. 11

Showing Existing Zoning for Surrounding Properties



A discussion of special exceptions, in general, is contained on pages 80-81 of the Master Plan.

The relevant portions are quoted below:

SPECIAL EXCEPTIONS

To some extent, development in Aspen Hill has occurred in ways unforeseen in the previous Plan. For example, some special exception uses have been approved that are out of character and scale with the low-density nature of their residential zone and the surrounding community. This Plan recommends the following guidelines for special exceptions to address the issues of scale and use compatibility.

. . . To provide guidance for locating future special exceptions, the following issues should be considered:

- *Avoid excessive concentrations of special exceptions and other nonresidential land uses along major transportation corridors.* Sites along these corridors are more vulnerable to over-concentration because they are more visible . . . ⁴ [Italics in original.]
- *Protect major transportation corridors and residential communities from incompatible design of special exception uses.* In the design and review of special exceptions, the following guidelines should be followed, in addition to those stated for special exception uses in the Zoning Ordinance:
 - a. Any modification or addition to an existing building to accommodate a special exception use should be compatible with the architecture of the adjoining neighborhood and should not be significantly larger than nearby structures.
 - b. Front yard parking should be avoided because of its commercial appearance; however, in situations where side or rear yard parking is not available, front yard parking should be allowed only if it can be adequately landscaped and screened.
 - c. Close scrutiny should be given to replacing or enhancing the screening and buffering as viewed from the abutting residential areas and along the major roadways.

Finally, there is a lengthy general discussion of the need for child care facilities on pages 195 to 196 of the Master Plan. At the end of that discussion, the Plan contains the following

⁴ The remainder of this paragraph discusses another location, the intersection of Homecrest and Bel Pre Roads.

recommendations and design guidelines:

Child care facilities should be encouraged to meet the needs of the residents of Aspen Hill. To the extent possible, they should consistently provide the following:

- Sufficient open space to provide adequate access to sunlight and suitable play areas, taking into consideration the size of the facility.
- Location and design to protect children from excessive exposure to noise, air pollutants and other environmental factors potentially injurious to health or welfare.
- Location and design to ensure safe and convenient access. This includes appropriate parking areas and safe and effective on-site circulation of automobiles and pedestrians.
- Location and design to avoid creating undesirable traffic, noise and other impacts upon the surrounding community.
- Consideration should be given to locations in employment centers to provide locations convenient to work places. However, these locations should make provisions for a safe and healthful environment in accord with the criteria listed above.

. . . This Plan supports various types of child day care facilities within the planning area, particularly those providing care to the youngest children. . . .

Technical Staff's Community-Based Planning Division found the proposed special exception use to be consistent with the recommendations of the 1994 Aspen Hill Master Plan, even at the enrollment and staff levels originally proposed (Exhibit 158 children and 25 staff). *See* Memo of July 28, 2009 attached to the Technical Staff Report (Exhibit 119). Technical Staff's Urban Design and Preservation Division found the proposed special exception use to be consistent with the first, second and fifth design guideline bullet points quoted above. In order to satisfy the third and fourth bullet points, Staff recommended that there be a sidewalk on Catoctin to connect to the proposed building and a one-way driveway to control circulation through the site. Both of those recommendations have been incorporated into Petitioner's current proposal. Staff also suggested that Petitioner consider "cross vehicular access with the adjacent bank property to alleviate traffic concerns on Catoctin," but

as mentioned elsewhere in this report, the owner of the bank's property has refused to agree to such an arrangement.

Technical Staff's Development Review Division quotes the analysis of Staff's Community-Based Planning Division referenced above, but also adds the following note (Exhibit 119, pp. 15-16):

The 1994 Master Plan specifically recommends a day care center for the subject property. However, given the fact that the last master plan for the area was approved in 1994, 15 years ago, the "Child Day Care" envisioned by the master plan may have been one that is considerably smaller in terms of building size and number of children than that proposed by the subject application. As noted by Community Based Planning Staff, development in Aspen Hill has occurred in ways unforeseen by the current Plan. However, in this particular case, the master plan has provided a site specific recommendation, which is a child day care use with no specifications or restrictions.

Petitioner's land planner, Victoria Bryant, noted that Master Plans for this site had, at least for the last 40 years, recommended a non-residential use for this site. The 1970's Master Plan for Aspen Hill had recommended a library on this site, and the current Master Plan recommends a daycare facility. In her opinion, the intersection of Bel Pre and Layhill and Bonifant is not an appropriate place for a residential use. 1/15/10 Tr. 132-134.

The Aspen Hill master plan supports the construction of a daycare facility on this site. The master plan also goes on to say that the need for daycare in Aspen Hill is slightly above average for the rest of the County, that the residents in this area prefer a daycare center over a home-based type facility, and that infant and toddlers were identified as being of great need in the area. This facility provides all of those, so it is very consistent with what the master plan recommends. 1/15/10 Tr. 131-132.

Ms. Bryant reported in her Land Planning Report (Exhibit 223(b), p. 6) that there is a lack of similar childcare uses within this part of Silver Spring, with the nearest comparable facility being 2.4 miles away (the Childtime Learning Center). She notes that other, less comprehensive childcare options are marginally closer to the site (the Winchester School being 1.2 miles away), but there are no daycare facilities at present along Layhill Road.

Not surprisingly, the opposition reads the Master Plan differently. They argue that when the Master Plan was drafted in 1994, daycare centers were smaller than they are now, and the planners

likely didn't envision one the size being proposed here. Peter Zara, testifying on behalf of BPHOA, noted that Technical Staff specifically mentions, in its report, that the Master Plan probably had not intended to have a daycare center of the proposed size on that plot. 1/15/10 Tr. 227.

Janice Walden also argued on behalf of BPHOA that the proposed use is incompatible with her neighborhood and not what was envisioned by the Master Plan recommendation. Relying on Kiddie Academy's website, she urged that the proposed use, given its size and "curriculum" is more like a private educational institution (PEI) than a daycare center and should have been filed under that category. 1/22/10 Tr. 202-220. As mentioned at the beginning of this document, that issue will be discussed in IV.A. of this report.

Ms. Walden also argued that the proposed daycare center contradicts the Master Plan with regard to traffic safety concerns. She quoted the Master Plan as stating on pages 80 and 81 that future special exceptions should, "avoid excessive concentrations of special exceptions and other nonresidential land uses along major transportation corridors. Sites along these corridors are more vulnerable to over-concentrations because they are more visible. It is important in this area to minimize uses that might diminish the safety and reduce the capacity of the roadway by creating to many access points, and conflicting turning movements."⁵ 1-15-10 Tr. 234.

The Hearing Examiner has carefully reviewed the Aspen Hill Master Plan. It clearly "support[s] a special exception on the R-200 portion of the site for a day care center" and recommends "access onto Catoctin Drive." Master Plan, p. 59. Despite the opposition's speculations on the point, there is no evidence from which the Hearing Examiner can conclude that the drafters of the Master Plan only considered a smaller facility. Although Technical Staff observed that "the 'Child Day Care' envisioned by the master plan may have been one that is considerably

⁵ The way this section of the Master Plan was quoted by Ms. Walden is misleading. Without stating it at the hearing, she left out the language between the second and third sentence which indicates that the "area" being referred to in the third sentence is the area "near the intersection of Homecrest and Bel Pre Roads," not the subject site. Master Plan, p. 81.

smaller in terms of building size and number of children than that proposed by the subject application,” Staff also concluded, “However, in this particular case, the master plan has provided a site specific recommendation, which is a child day care use with no specifications or restrictions.” Exhibit 119, pp. 15-16.

Given this record, the Hearing Examiner concludes, as did Technical Staff, that the proposal is consistent with the Master Plans recommendations. The recommendation in the Master Plan for a childcare center on this site is very specific, and specific recommendations usually govern over general recommendations, as a matter of statutory interpretation. Moreover, there are no general recommendations in the Master Plan that defeat this proposal. Where design features were recommended by Technical Staff (*i.e.*, a sidewalk and one-way circulation through the site) to assure compliance with general Master Plan design recommendations, they have been implemented. In addition, the size of the proposed building was reduced as a result of the hearing to improve compatibility; its height is limited to 30 feet; and it will be designed with residential features (*i.e.*, brick façade, residential windows and roof), as noted by Technical Staff. Exhibit 119, p. 13. Parking will be appropriately screened.

On the other hand, the concern about traffic and safety issues expressed in the Master Plan at p. 196, and by the opposition, must also be addressed. These issues are discussed at length in Part II. D. of this report. The Hearing Examiner concludes that the traffic and safety issues created by the site’s location can be adequately managed by the proposed Transportation Management Plan (TMP) and by the other conditions recommended by the Hearing Examiner in Parts II.D. and V of this report. These include limits on special events, restrictions regarding on-street parking, and a traffic impact review after the first year of operations, before full enrollment may be achieved.

Based on this record, the Hearing Examiner concludes that the proposed use, as conditioned, is consistent with the 1994 Aspen Hill Master Plan.

D. Proposed Use

1. Proposed Use:

Petitioner proposes to construct and operate a child daycare center for up to 138 children (on site at any one time), supervised by 23 fulltime-equivalent staff.⁶ They would be housed in a one-story building with a footprint (and floor area) of 9004 square feet (approximately 127 feet by 71 feet).⁷ Petitioner's vision for the proposed building is depicted in the following color rendering (Exhibit 140):



If the special exception is approved, Petitioner plans to lease the property to a child daycare provider, AMG, LLC, run by Milena and Garrett Mattingly, who will operate the facility under a franchise from Kiddie Academy. Exhibit 3 and 10/23/09 Tr. 76.

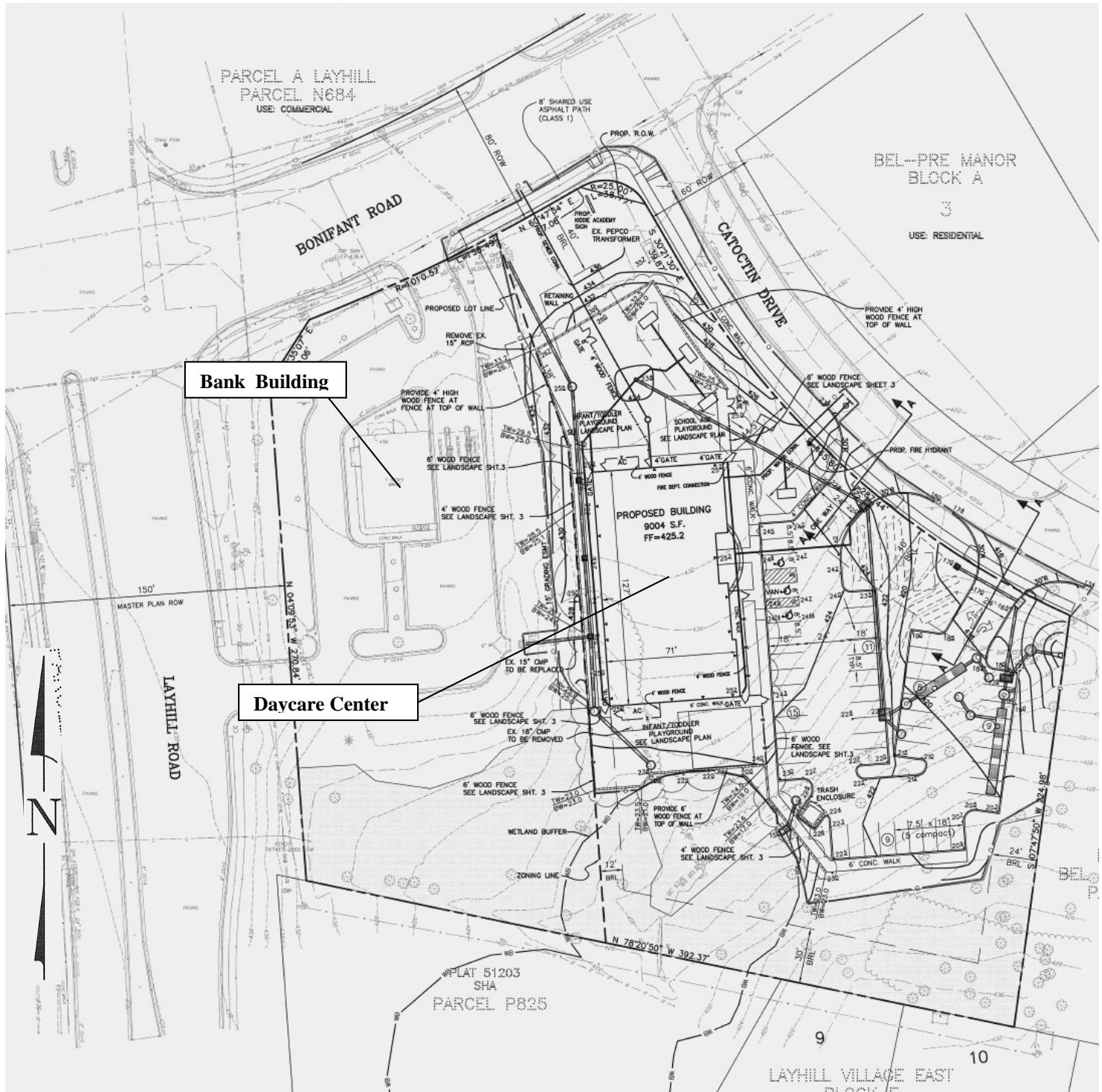
The children will include infants (6-weeks to 18 months), toddlers (18 months to 2 years of age), preschool age (2 to 5 years of age) and school age children (5 years to 12 years), for before and after-school care. Revised Statement of Operations (Exhibit 223(a)).

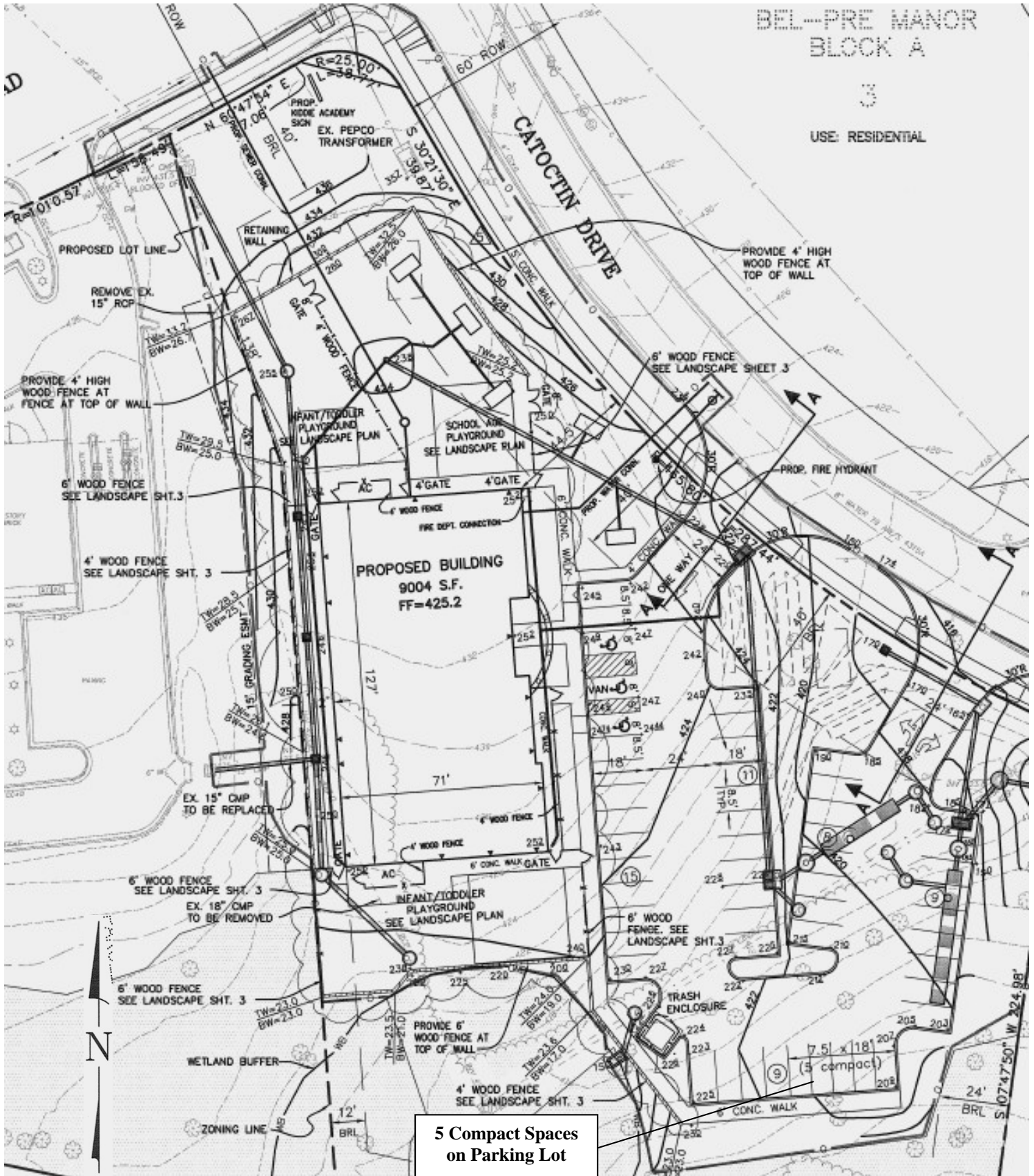
⁶ The petition initially sought to allow 158 children with a staff of 25, but it was reduced in an effort to address concerns raised by the opposition and the Hearing Examiner. The term "fulltime-equivalent" is used in reference to the staff, because some of the staff may be part time (*i.e.*, two half-time workers would be equivalent to one full time worker).

⁷ The building was originally going to be 9,728 square, but the proposal was reduced in the course of the hearing. Thus, the current figures are smaller than those used by Technical Staff in its initial evaluation; however, Technical Staff approved changes to the plans. *See, e.g.*, Exhibits 165, 166, 208 and 224.

2. Revised Site Plan:

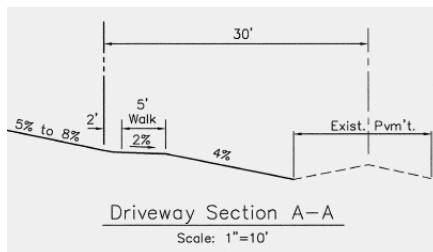
The revised Special Exception Site Plan (Exhibit 223(d)), is reproduced below. A blowup of the site layout is shown on the following pages, as well as development standards and other details shown on the site plan:





LEGEND:Existing

- = Fire Hydrant
- = Mailbox
- = Over Head Wire(s)
- = Sewer Manhole
- = Sewer Pipeline
- = Shrub
- = Sign
- = Storm Drain Grate
- = Storm Drain Inlet
- = Storm Drain Man Hole
- = Storm Drain Pipeline
- = Transformer
- = Tree, Shade
- = Tree, Shrub and/or Planting Line
- = Utility Pole
- = Water Meter
- = Water Pipeline
- = Water Valve
- = Well/Monitor Well

Proposed

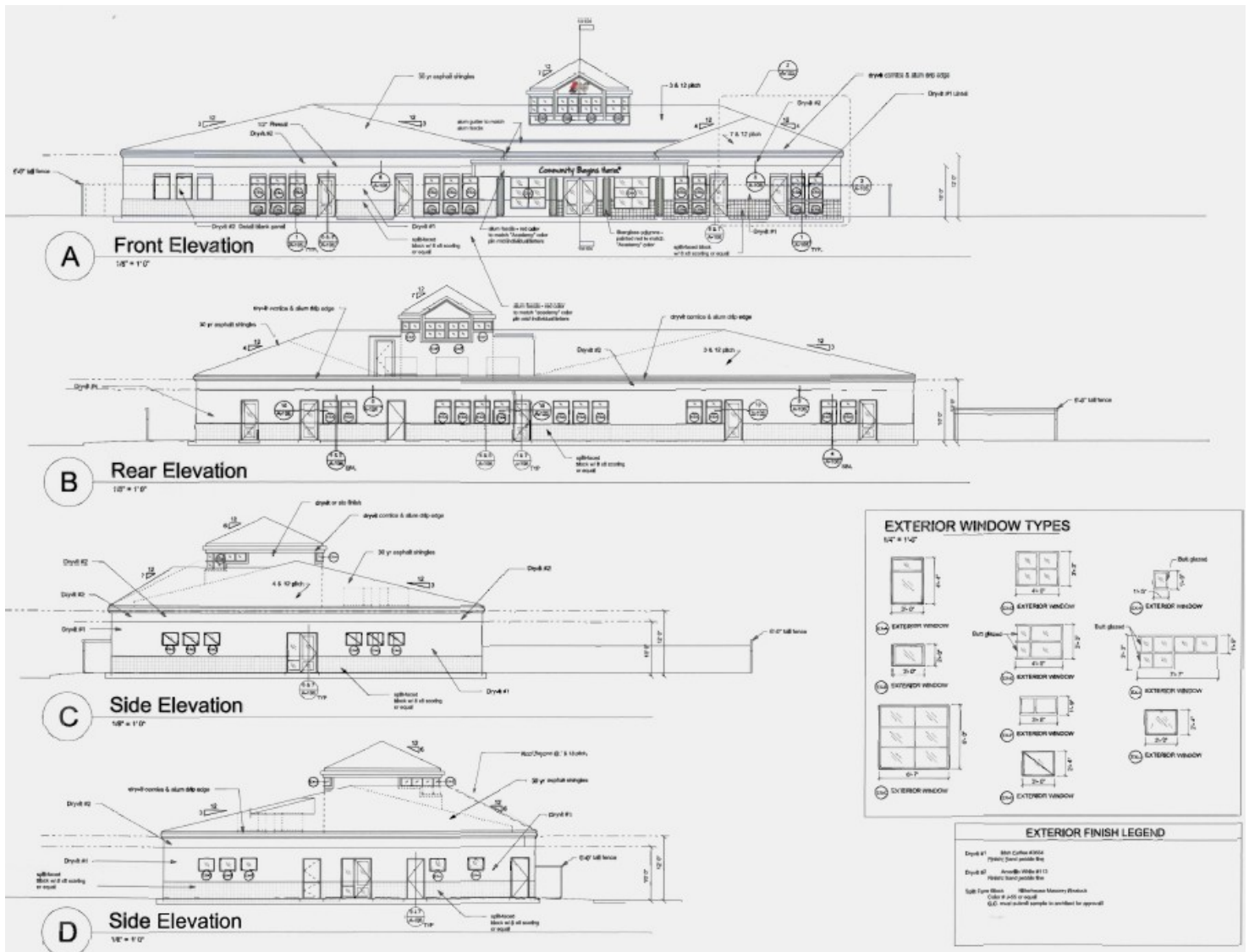
- = Curb & Gutter
- = 6" SEWER
- = 15" RCP
- = 3" WATER
- = 755+
- = 474
- = Limits Of Disturbance
- = TW=55.9
BW=53.9
- = Door Locations
- = FDC
- = WHC
- = Category I Forest Conservation Easement

DEVELOPMENT STANDARDS – R-200

	Required/Permitted	Proposed for Approval
Minimum Tract Area: 59-C-1.321(a)	20,000 sqft.	80,802 sqft
Minimum Lot Area: 59-C-1.322(a)	20,000 sqft	80,802 sqft
Minimum Lot Width at front BRL: 59-C-1.322(b)	100 feet	323.90 feet
Minimum Lot Width at street line: 59-C-1.322(b)	25 feet	54.74 feet
Yard Requirements 59-C-1.323	Front: 40 feet or EBL Side: 12 feet min one side 25 feet total Rear: 30 feet	 44.5 feet 12 feet min one side 25 feet total 30 feet

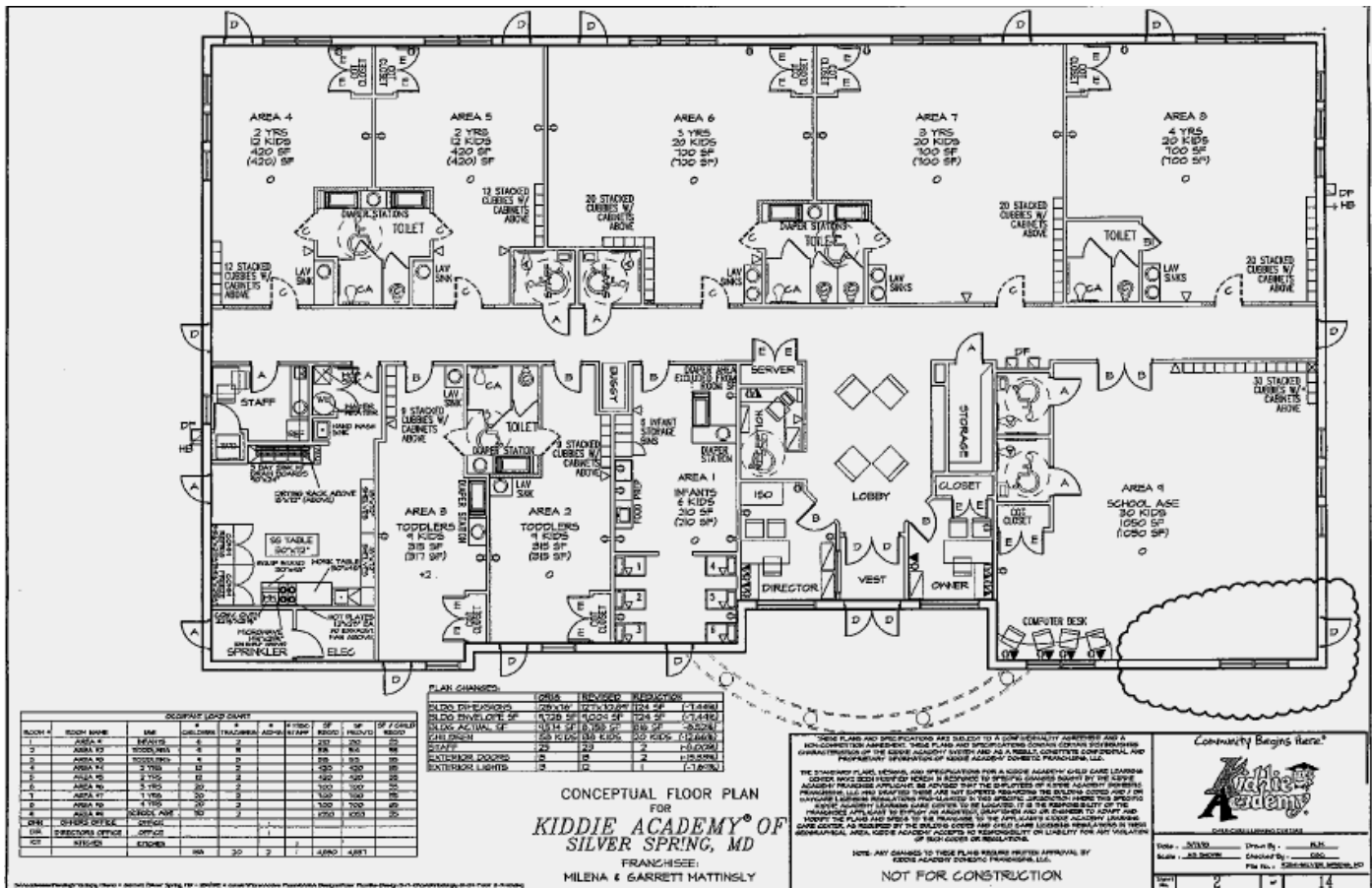
Building Height 59-C-1.327	50 feet max.	30 feet
Building Coverage:	25% max. or 20,201 s.f.	11.1% or 9004 s.f.
Building Area	9004 s.f.	
Playground Area	12,984 s.f.	
Square Feet per Child	94 s.f. based on 138 capacity	
Licensing Requirements	75 s.f./child or 11,850 s.f.	
Parking Required	1 Space per 6 students=23 1 Space per employee = 23 Total required parking spaces =46	
Handicap Accessible spaces required	= 3	
Parking Proposed	52 Includes 3 handicap accessible spaces, 5 compact spaces	

Below are Exterior Elevations for the site (Exhibit 138):



Outdoor play areas will consist of an infant/toddler playground area, a preschool playground area and a school-age play area, totaling approximately 12,984 square feet. The proposed use of the indoor area was set forth in a floor plan (Exhibit 133), submitted during the hearing. However, Chris Commarota, a representative of Kiddie Academy, testified that when plans for the proposed building were revised, reducing its size to 9004 square feet, one classroom was eliminated from the floor plan, and the playgrounds were slightly increased in size. 4/9/10 Tr. 9-10. A revised floor plan, Exhibit 232(a), was therefore filed after the hearing. It is conceptual at this stage, since the building has not

yet been constructed, but it is reproduced below in lieu of the now superseded floor plan.



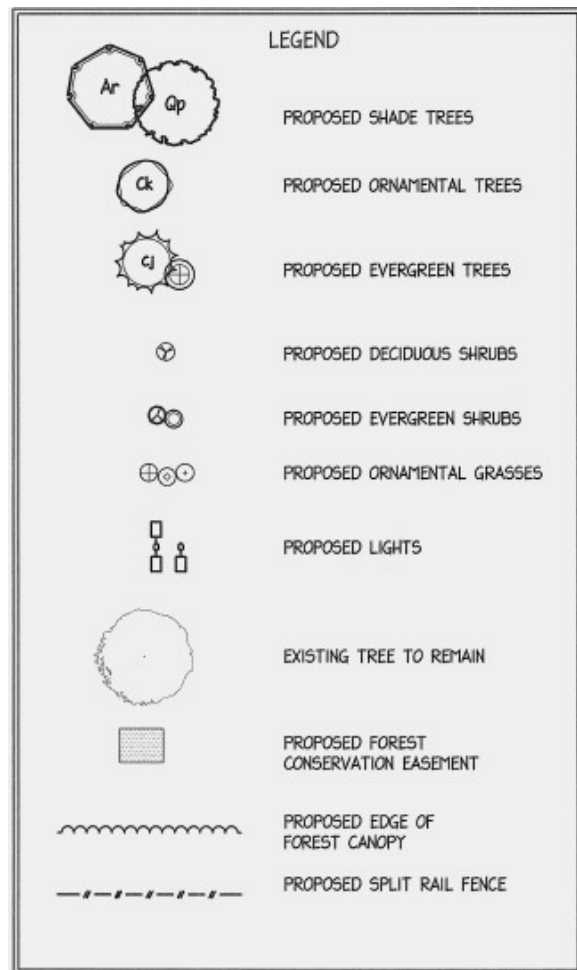
3. Landscaping, Lighting and Signs:

Landscaping on the site is depicted in the revised landscape plan (Exhibits 223(e), (f) and (g)), admitted at the hearing. The plant list is shown below and on the following page, followed by the site diagram, showing the locations of these plantings, and depictions of the proposed fence and wall:

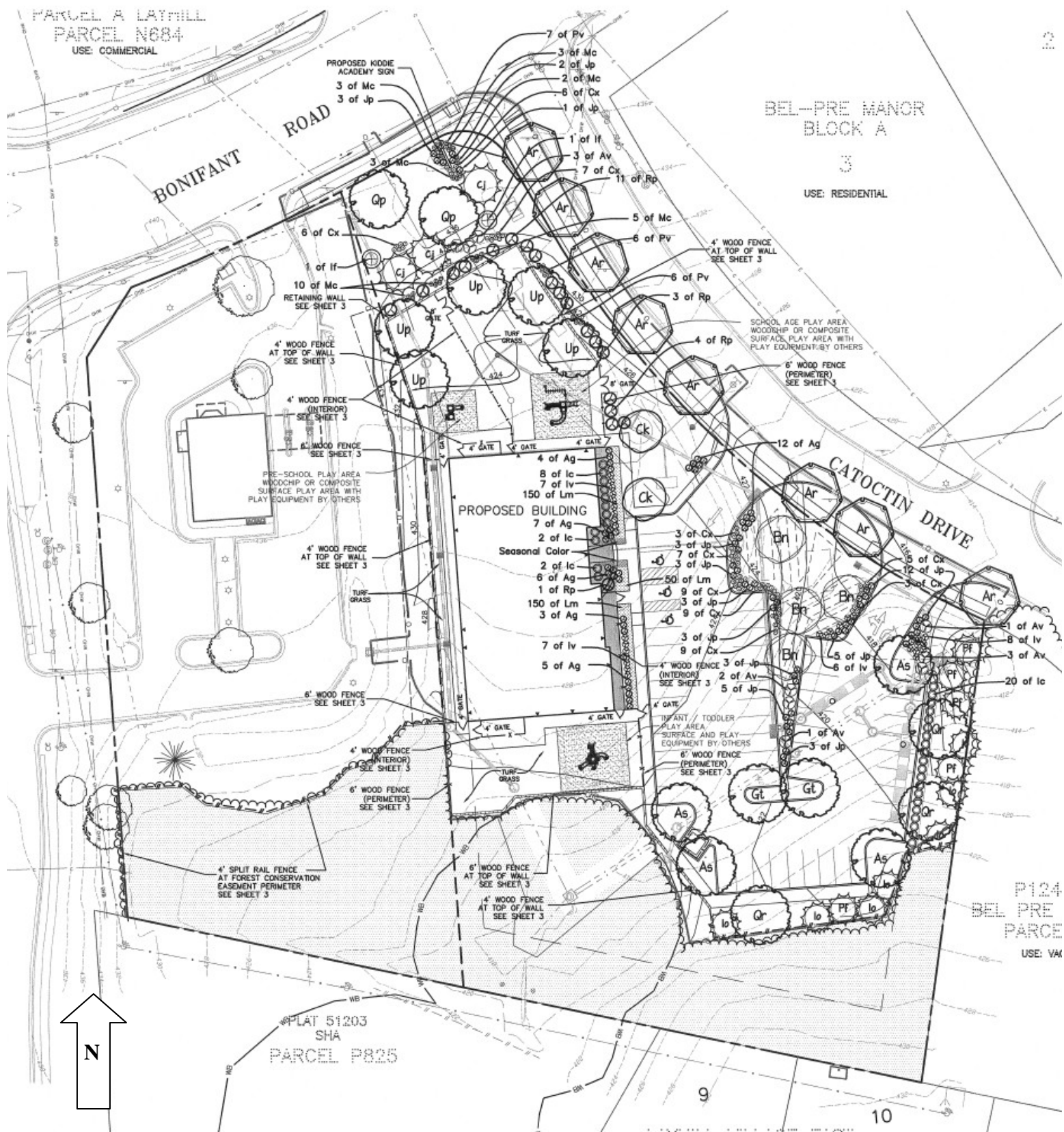
PLANT LIST:

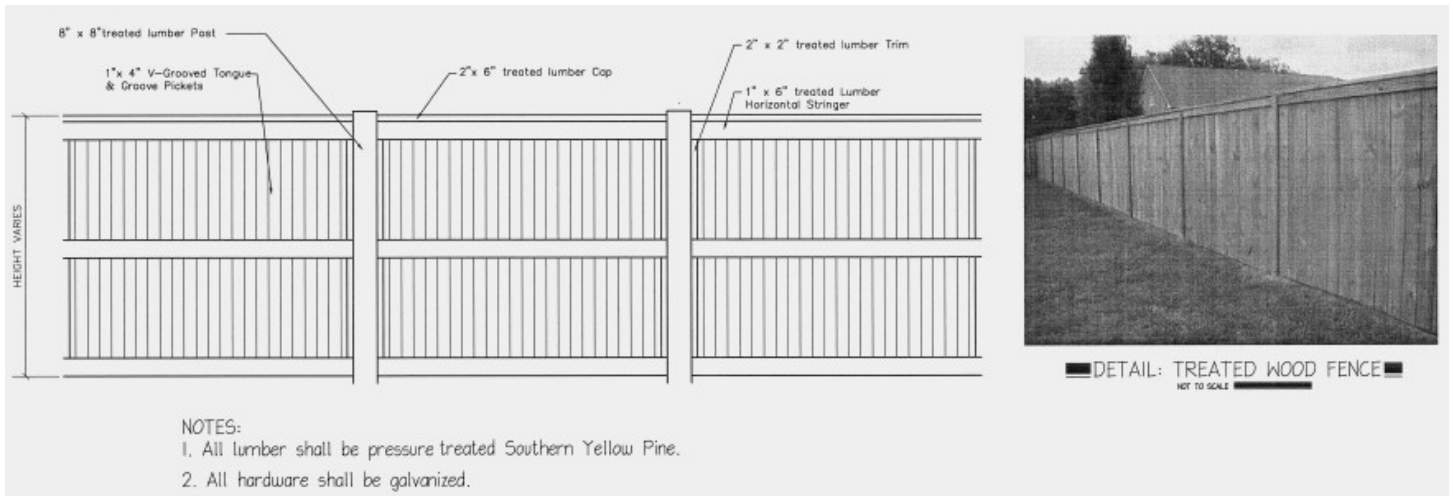
KEY	QTY	BOTANICAL NAME	COMMON NAME	CAL.	HST.	SPRD.	ROOT.	MISC.
SHADE TREES								
Ar	8	Liquidambar styraciflua 'Rotundiloba'	Seedless Sweetgum	2 1/2-3"			B & B	
As	4	Acer saccharum 'Legacy'	Legacy Sugar Maple	2 1/2-3"			B & B	
Qp	2	Quercus phellos	Willow Oak	2 1/2-3"			B & B	
Qr	3	Quercus rubra	Red Oak	2 1/2-3"			B & B	
Up	5	Ulmus Parvifolia 'Allee'	Allee Lacebark Elm	2 1/2-3"			B & B	
Et	2	Gleditsia triacanthos 'Halka'	Halka Honeylocust	2 1/2-3"			B & B	
*Bn	4	Betula nigra 'Heritage'	Heritage River Birch		8-10'		B & B	

EVERGREEN TREES								
Cj	3	Cryptomeria japonica 'Yoshino'	Yoshino Japanese Cedar		7-8'		B & B	
If	2	Ilex x attenuata 'Foster's'	Foster's Holly		5-6'		B & B	
Io	7	Ilex opaca	American Holly		5-6'		B & B	
Pf	5	Pinus flexilis 'Vanderwolf's Pyramid'	Vanderwolf's Pyramid Limber Pine		7-8'		B & B	
DECIDUOUS SHRUBS								
Av	10	Viburnum dentatum 'Ralph Senior'	Autumn Jazz Arrowwood Viburnum		3 - 4'		B & B	6' o.c.
Iv	28	Itea virginica 'Sarah Eve'	Sarah Eve Sweetspire		24-30"		B & B	36" o.c.
EVERGREEN SHRUBS								
Ag	37	Abelia 'Edward Goucher'	Edward Goucher Abelia		24-30"		Cont.	36" o.c.
Ic	32	Ilex crenata 'Compacta'	Compact Japanese Holly		18-24"	18-24"	Cont.	48" o.c.
Jp	46	Juniperus x pfitzeriana 'Aurea Improved'	Gold Coast Juniper			24-30"	Cont.	36" o.c.
Rp	19	Rhododendron 'PJM'	PJM Rhododendron		30-42"		Cont.	6' o.c.
ORNAMENTAL TREES								
Ck	2	Cornus kousa 'Milky Way'	Kousa Dogwood		5-6'		B & B	multi-stem
ORNAMENTAL GRASSES								
Cx	64	Calamagrostis x acutiflora 'K Fstr'	Karl Foerster Feather Reed Grass				# 1 cont.	24" o.c.
Mc	26	Muhlenbergia capillaris	Muhly Grass				# 1 cont.	24" o.c.
Pv	19	Panicum virgatum 'Heavy Metal'	Heavy Metal Switchgrass				# 1 cont.	24" o.c.
GROUND COVER								
Lm	350	Liriope muscari 'Big Blue'	Big Blue Liriope				# 1 cont.	12" o.c.

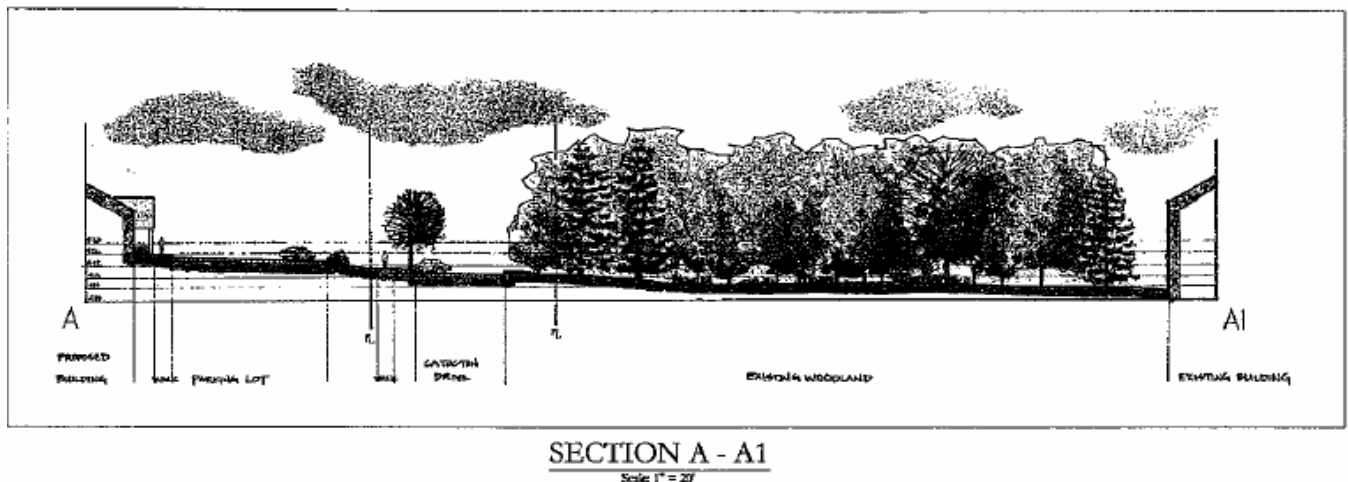


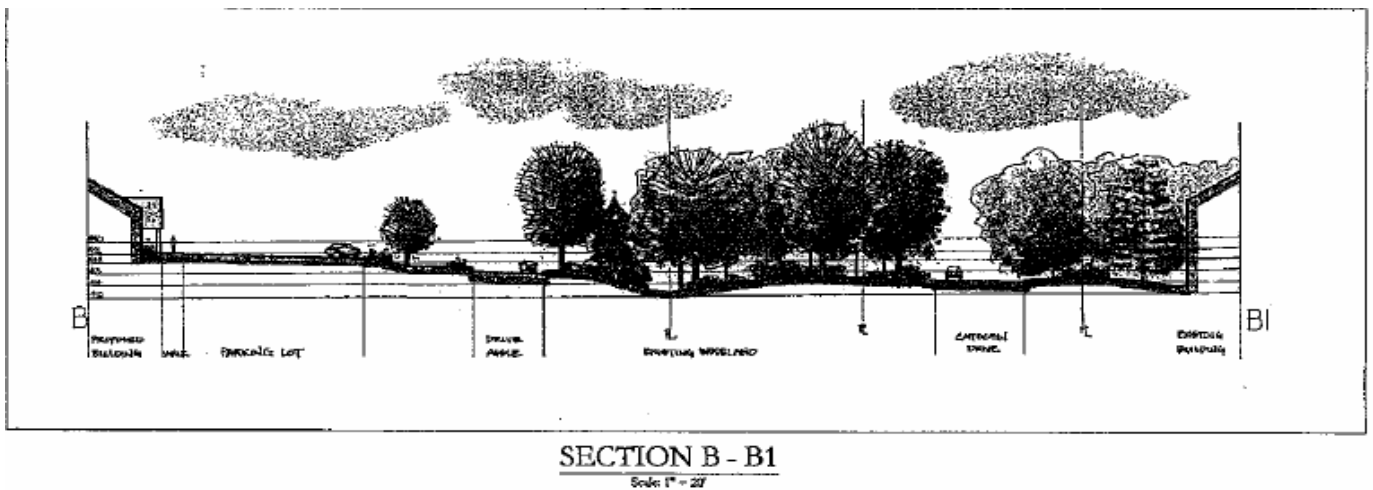
Kiddle Academy - Layhill				
Parking Lot Shade Calculations				
Sec. 59-E-2.83(d) Shading of Paved Areas:				
Parking Lot Paved Area	18,643	sf		
30% Shade Requirement	5,593	sf		
Shade Provided	6,503	sf		
COMMON NAME	QTY	15 YEAR CANOPY DIA (FT)	CANOPY AREA (SQ FT)	TOTAL AREA (SQ FT)
Red Maple*	3	36	1,017	3,052
Sugar Maple*	4	22	380	1,520
Red Oak*	3	26	531	1,592
Kousa Dogwood**	3	12	113	339
TOTAL				6,503
* 15-year canopy diameter calculated at 75% of the 20-year Mature Canopy coverage as shown in the 1992 Montgomery County Trees Technical Manual, pp.88-88.				
** Canopy diameter interpolated from data compiled by the Virginia Nursery Landscape Association for tree canopy coverage at 10 and 20 years (www.vnla.org).				





The revised landscape plan reflects petitioner's proposal to provide additional plantings (a tree and shrubs) as a result of concerns raised by the neighbors at the hearing. 4/9/10 Tr. 41. To demonstrate this screening, Petitioner introduced two revised "sections" of the site (Exhibit 219), which depict the new landscaping and existing trees as viewed from the south (*i.e.*, looking north):





The location of these sections is noted on the following Cross Section Plan (Exhibit 148(g)):






Technical Staff spoke approvingly of the proposed landscaping (Exhibit 119, p. 2):

Landscaping consisting of a significant number of plant materials, required setbacks, fencing of the child play area, building orientation forest conservation easements and existing topographical features will provide adequate screening and buffering of the proposed use and activities from adjoining properties and roads while at the same time providing an aesthetically pleasing environment.

Site plan for Parcel A, Block 4, Bell Pre Manor. The plan shows a proposed building with a footprint of 425.2, a parking lot, and surrounding streets including Canyon Drive. A north arrow and scale of 1"=30' are provided. The plan is overlaid with a grid of lot numbers.

Labels on the plan include:

- BELL PRE MANOR
- BLOCK 4
- USE RESIDENTIAL
- CANYON DRIVE
- PROPOSED BUILDING
- 6728 S.E.
- FF=425.2
- Parcel A
- 1"=30'
- P10409
- BELL PRE MANOR
- PARCEL A
- USE VACANT
- 67209
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Luminaire Schedule						
Symbol	Qty	Label	Arrangement	Lumens	LLF	Description
	10	WP	SINGLE	9500	0.750	Gardco 101-MT-100MH
	6	A-HS	SINGLE	20500	0.750	EH19-4X-250MH-HS on SSS12-4-11-D1
	2	A2	BACK-BACK	20500	0.750	Gardco # EH192-4X-250MH-NA Pole# SSS12-4-11-D2

Luminaire Location Summary						
LumNo	Label	X	Y	Z-Height	Orient	Tilt
4	A2	-9700	72954	12	0	0
18	A-HS	-9735	73037	12	309.806	0
15	A-HS	-9768	72909	12	8.746	0
5	A-HS	-9695	72825	12	92.386	0
7	A-HS	-9642	72935	12	180	0
19	A-HS	-9637	72869	12	170.538	0
14	A-HS	-9773	72977	12	3.366	0
3	A2	-9700	72878	12	180	0
22	WP	-9790	73042	8	90	0
24	WP	-9858	72960	8	180	0
25	WP	-9860	72996	8	180	0
20	WP	-9859	73038	8	90	0
21	WP	-9822	73040	8	90	0
28	WP	-9810	72912	8	270	0
29	WP	-9780	72914	8	270	0
27	WP	-9851	72910	8	270	0
26	WP	-9862	73023	8	180	0
23	WP	-9855	72926	8	183.495	0

The photometric study reproduced above shows that light leakage at the side and rear lot lines does not exceed the 0.1 footcandle standard established for residential areas by Zoning Ordinance §59-G-1.23(h). Moreover, the hours of lighting are restricted in the revised statement of operations (Exhibit 223(a)), as follows:

10. Light Poles:

Morning Hours: On at 6:00 a.m. and off at 8:00 a.m.

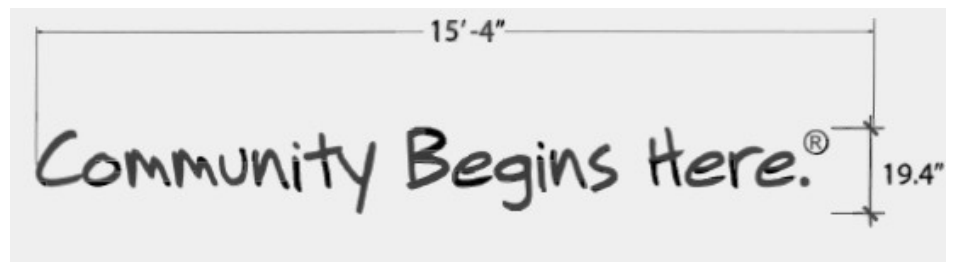
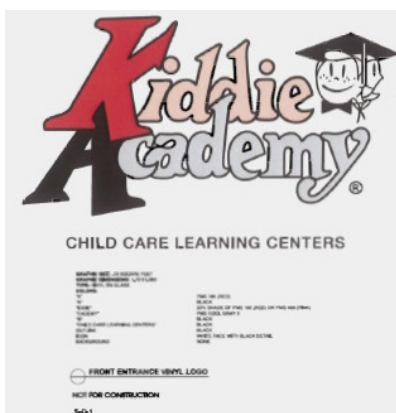
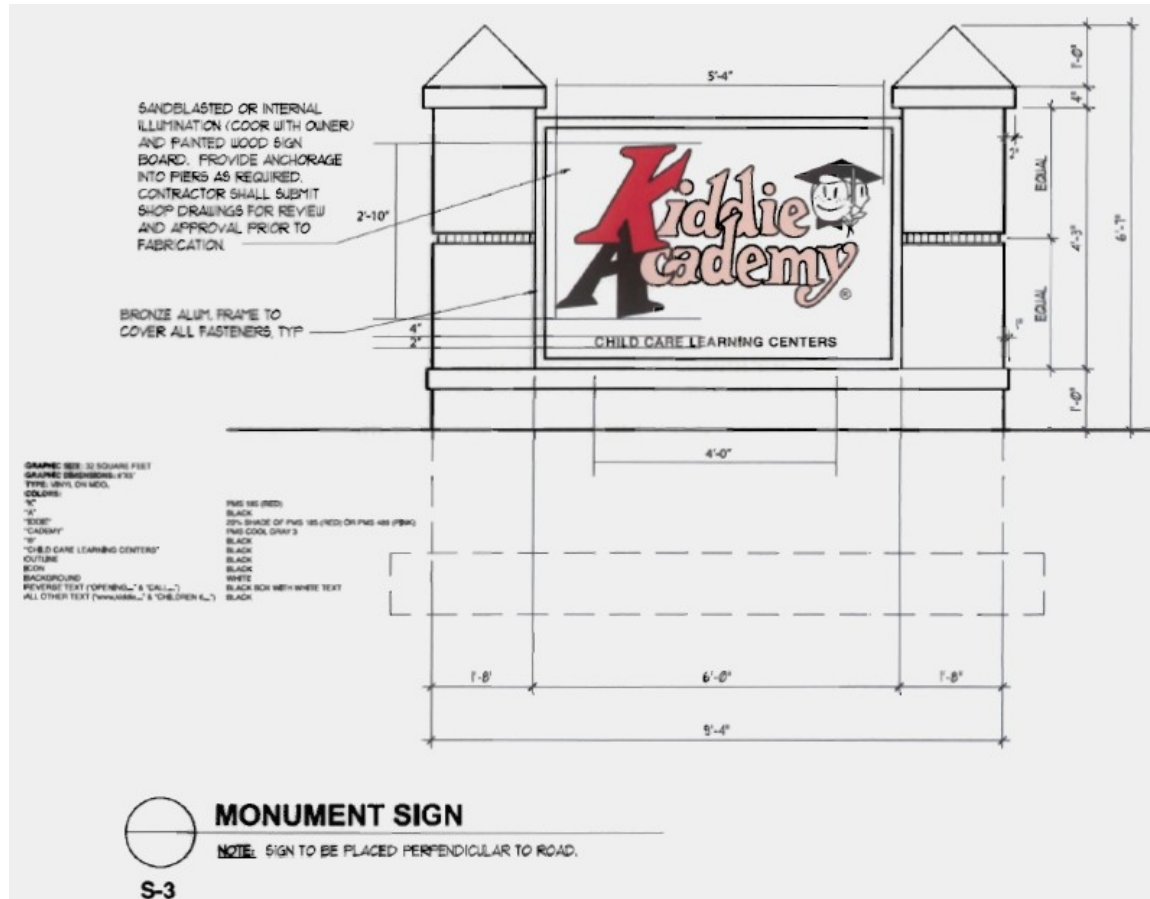
Evening Hours: On at 4:30 p.m. and off at 10:00 p.m., except for special events when will be turned off at 11:00 p.m.

11. Signage Lights:

Monument Sign: Sign lights will go on at 4:30 p.m. and go off at 10:00 p.m. except for special events when sign lights will go off at 11:00 p.m.

Wall signs: Signs will go on at 4:30 p.m. and go off at 10:00 p.m. except for special events when signs will go off at 11:00 p.m.

Petitioner seeks permission to provide multiple signs: one monument sign, 6 feet seven inches in height and containing 32 square feet of graphic area; and numerous wall-mounted signs, all of which are depicted in Petitioner's sign plan (Exhibit 139). A portion of the plan is reproduced below:



Zoning Ordinance §59-F-4.2 provides that, “the total area of all permanent signs on a lot or parcel in a residential zone must not exceed 2 square feet, unless additional area is permitted pursuant to this ordinance.” Petitioner would thus require a sign variance from the Department of Permitting Services (DPS) in order to post the desired signage, pursuant to Zoning Ordinance §59-F-12.1. That section prohibits DPS from approving a sign less restrictive than provided in the Board of Appeals’ conditions, although it may approve greater restrictions.

Technical Staff notes that Petitioner agreed to relocate its proposed monument further from Catoctin Drive, as indicated on its revised landscape plan. Staff also makes the following observation (Exhibit 119, p. 13):

. . . The applicant has provided details of the proposed monument sign which exceeds the allowable size for residentially zoned areas. Details are also provided for the proposed wall, entrance and temporary signs. All signs placed on the property must meet the requirements of Section 59-F-4.2 (a) in terms of number, location and size and Section 59-F-4.1 (e) regarding illumination.

Thus, Staff recognizes that the proposed signage is beyond that which is permitted in a residential area, but doesn’t make any specific recommendations regarding the issue.

The Hearing Examiner agrees with BPHOA that the signage proposed in the signage plan is excessive for this entrance to a residential area, and recommends that signage be limited to black and white signs, including one monument sign, one wall sign with Petitioner’s logo and one sign over the entrance with their motto “Community Begins Here, ” as depicted in Petitioner’s elevations (Exhibit 138), reproduced on page 22 of this report. The monument sign should be restricted to five feet in height and seven feet in width, as measured from the outside of the support structure. The signs may be illuminated at the times specified in the revised statement of operations (Exhibit 223(a)). No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, where required, and a copy of these documents are filed with the Board of Appeals. A condition is proposed to this effect in Part V of this report.

4. Operations and Staffing:

Operations on the site will be governed by the conditions imposed by the Board; by Petitioner's revised Statement of Operations (Exhibit 223(a)); and by Petitioner's revised Transportation Management Plan, also known as the TMP (Exhibit 209(g)). The TMP will be discussed in the next section of this report.

The Statement of Operations was revised a number of times in response to issues raised at the hearing. Many specifics were added and the number of permitted special events was reduced to no more than 52 a year (*i.e.*, an average of one a week). Ultimately, the final revisions resulted in the Statement of Operations of April 28, 2010 (Exhibit 223(a)). It provides:

The proposed child day care facility will have the following binding operational characteristics:

1. Hours of business operation - 6:30 a.m. – 6:30 p.m. daily, Monday thru Friday. Employees will arrive approximately at 6:00 a.m. and leave approximately at 7:00 p.m.

2. Employees- The maximum number of employees at 100% capacity of 138 children will be 23 full-time equivalent employees.

3. Maximum number of children- on site at any time will be 138.

4. Parking Spaces- A total of 52 on-site parking spaces will be provided of which 5 will be compact spaces.

5. Shuttle Van- A shuttle van, if needed, will used to transport before and after-school children as well for use for day time programs for the children such as to the zoo, museum and other learning environments.

6. Special Events- There may be special event programs for the children and their parents which occur on week-ends or after 6:30 p.m. Monday-Friday. The permitted hours of such events shall be between 10:00 a.m. to 3:00 pm. for Saturday events and not later than 10:00 p.m. on weekdays. Should an event require off-site parking, such parking will be arranged at near by locations. Should an event require off-site parking, such parking will be arranged at near by locations with parents brought to the subject property by shuttle. A list of the type and frequency of Special Events is attached as Exhibit "A" to this Statement of Operations.

7. Deliveries- All deliveries are expected to occur only during week days. Food deliveries are expected to occur once a week. Supplies and equipment deliveries are expected

to occur once every other week. Except for Special Events such deliveries will occur between 9:00 a.m. and 3:00 p.m.

8. Trash Collection- Collection is expected to occur once a week during week days. Such collections will occur between 9:00 a.m. and 3:00 p.m.

9. Building Cleaning Operations: The facility will be cleaned on a daily basis after the close of business operations. Such cleaning will take approximately 2 and ½ hours to complete.

10. Light Poles:

Morning Hours: On at 6:00 a.m. and off at 8:00 a.m.

Evening Hours: On at 4:30 p.m. and off at 10:00 p.m., except for special events when will be turned off at 11:00 p.m.

11. Signage Lights:

Monument Sign: Sign lights will go on at 4:30 p.m. and go off at 10:00 p.m. except for special events when sign lights will go off at 11:00 p.m.

Wall signs: Signs will go on at 4:30 p.m. and go off at 10:00 p.m. except for special events when signs will go off at 11:00 p.m.

12. Playground Activity: Except for a one-time Grand Opening on a Saturday (between 10:00 a.m. and 3:00 p.m.), no playground activity will occur prior to 8:30 a.m. or after 5:30 p.m. The actual time for each age group and the number of children in each age group may change periodically depending upon enrollment and applicable program curriculum. However, no more than 88 children shall occupy the three (3) playgrounds at any time.

13. Outdoor Music and Amplification of Sound: There will be no playing of outdoor music or sound amplification.

14. Maintenance and Routine Landscaping: Routine landscaping care is expected to occur once a week during the appropriate season(s) of the year. Such activities will occur between 9:00 a.m. and 3:00 p.m.

EXHIBIT "A" SPECIAL EVENTS

Parent nights	Weekday Evenings/Saturdays	max-1/month	50 people max
Open houses	Weekday Evenings/Saturdays	max-10/year	50 people max
Parent Events	Weekday Evenings	max-1/month	50 people max
Staff trainings/meetings	Weekday Evenings/Saturdays	max-1/month	50 people max
Seasonal/Holiday parties	Weekday Evenings/Saturdays	max-6/year	50 people max

No more than a total of 3 Weekday Evening events any one-week period shall be held.

Although the opposition still contends that the number of special events remains excessive, the Hearing Examiner does not find it so, especially given that 12 of the events will be staff meetings and training, and that off-site parking and shuttle vans will be provided if needed. If special events do result in problems, these issues should be raised at Community Liaison Council meetings and at the Board of Appeals review scheduled for this special exception after one year of operations.

5. Traffic, Parking, Pick-up and Drop-off:

The central issue in this case is the impact of anticipated traffic from the proposed daycare center upon the community. This issue is particularly important in this matter because the sole vehicular access to the daycare facility will be off of Catoctin Drive, a secondary residential street which is also the sole vehicular access for the community to reach the outside world. The Hearing Examiner has therefore carefully reviewed all of the testimony and exhibits in this regard.

Petitioner's traffic engineer, Mickey Cornelius, provided the only expert testimony regarding transportation planning. 10/23/09 Tr. 139-159; 1/15/10 Tr. 43-96; 4/9/10 Tr. 32-38, 66-152; 5/21/10 Tr. 16-21, 63-66. He began by describing the surrounding area road system and the traffic study he did in this case. Just to the north of the site, Bonifant Road traverses in an easterly direction from Layhill Road (It is called Bel Pre Road on the west side of Layhill Road.) Layhill Road (Maryland 182) is a north-south road, just to the west of the property. Bonifant Road merges into a single lane just to the east of Catoctin Drive.

The subject site is accessed off of Catoctin Drive, which is approximately 250 feet east of Layhill Road, along Bonifant Road. Catoctin Drive is a secondary residential street. It is approximately 25 feet wide and has a 60-foot wide right-of-way. Park and Planning Commission's Transportation Planning Staff provided the scope of his traffic study, which initially included three intersections – Bonifant Road at Layhill Road, Layhill Road at Middlevale Lane and Bonifant Road at Notley Road. The study included an evaluation of local area transportation review (LATR)

impacts, as well as the policy area mobility review (PAMR) for the proposed special exception.
10/23/09 Tr. 144-146.

Traffic counts were made at all the studied intersections and critical lane volumes (CLVs) were calculated for all the intersections under existing conditions. During the morning peak hour, the highest critical lane volume was 1,030, well within the 1,475 congestion standard. In the evening peak hour, the highest critical lane volume was 1,138, once again, well within the congestion standard. Traffic counts also included counts of bicyclists and pedestrians, and that information is noted in his report.

The next step in the analysis was to consider other approved developments that are required to be included as part of the study. There were four approved developments that were identified, and he conducted trip generation analyses for those additional future developments. He then assigned that traffic to the surrounding area road systems to come up with the future background condition, which is a future traffic volumes without the proposed daycare center, and once again analyzed those intersections, using critical lane volume capacity procedure. Once again, the critical lane volumes are well below the congestion standard of 1,475, with the highest CLV being 1,249, at the intersection of Layhill and Bonifant Road in the evening peak hour.

The next step was to then project traffic for the proposed daycare center. Park and Planning's Technical Staff provides trip generation rates for daycare centers in the County, and those rates are based upon the number of employees at the daycare center. Using the proposed maximum of 25 employees and the County's standards, Mr. Cornelius calculated the total number of trips that would be expected to be generated by the daycare center.⁸ He concluded that a maximum of 25 employees and 158 students at the facility would be expected to generate a total of 32 vehicles trips into the site in the morning peak hour, and 29 vehicle trips out of the site in that peak hour, for a total of 61.

⁸ Peter Zara's challenge to this methodology, on behalf of BPHOA, will be discussed later in this section.

During the even peak hour, pickup time, it would be expected to generate 33 vehicle trips into the site and 35 vehicle trips out of the site, for a total of 68.

Mr. Cornelius noted that many trips generated by daycare centers are either “pass by” trips or “diverted” trips.⁹ The trip generation analysis shows that in the morning peak hour, a total of 17 trips, or nine trips in and eight trips out, would be pass-by trips, people that are pulling off of Bonifant Road. And in the evening peak hour, there were a total of eight pass-by trips, four in, four out, that would come from Bonifant Road. The remainder of the trips were, for purposes of this traffic study, assumed to be new to the road system. The result is a total of 23 new trips in the morning peak hour entering the site, and 21 exiting the site. In the evening peak hour, a total of 29 new trips will enter the site, and 31 exist the site. So in terms of measuring impact on the overall road system, the total is 44 new trips in the morning peak hour, and 60 in the evening peak hour. However, Mr. Cornelius candidly admitted that, in terms of impact at the planned access to the site and on Catoctin Drive, the total is 61 total trips in the morning, and 68 in the evening [*i.e.*, whether they are new trips or pass-bys, they will still have an impact on Catoctin Drive].

Mr. Cornelius assigned the new trips to the surrounding road system, and then developed the total future traffic volumes at the studied intersections, using the critical lane volume methodology. The results show that all the intersections are still well within the congestion standard with the highest CLV occurring at the intersection of Layhill Road and Bonifant Road in the evening peak hour of 1,271. He thus concluded that, with regard to local area transportation review, the surrounding road system is capable of accommodating this development, and the daycare center would not cause any of those intersections to exceed the standards of the County.

⁹ Most trips to daycare centers involve motorists who are dropping their children off in route to another purpose, that is, the majority of them in the morning are going from home to work, and in the evening are going from work to home. A true pass-by trip would basically be a trip that's already on the road system, that stops into the center and continues along the trip, and doesn't change the travel pattern. A diverted trip is similar, but it wouldn't necessarily come right off the adjacent roadway. It would come from another roadway in the area.

Mr. Cornelius's report also identifies the required trip mitigation that is part of the policy area mobility review (PAMR). At the time the study was done, the mitigation requirement for Aspen Hill was 40 percent. As of today, that requirement is 20 percent. The number of trips that must be mitigated to satisfy PAMR will be worked out at the subdivision stage in order to get approval from both the County DOT and Park and Planning.

Petitioner has suggested that a good way to mitigate those trips and satisfy PAMR is the construction of sidewalks in the area. There are sidewalks on both sides of Bonifant Road, but there are no sidewalks along Catoctin Drive. As part of the development of this site, sidewalks would have to be installed along the frontage, but in addition to that, sidewalks could be provided on the other side of Catoctin Drive, which would provide a place for pedestrians to walk (and middle and high school students a place to stand safely while awaiting the school bus on Bonifant).

Subsequent to Petitioner's traffic study, comments and questions were received from the community. Therefore, Park and Planning staff asked Mr. Cornelius to go out and conduct queuing counts along Bonifant Road, extending back from the signal at Layhill Road, and on Catoctin Drive, at the approach to Bonifant Road. Those queuing counts were conducted by his office on Tuesday, April 16, 2009, and they are reflected in a revised traffic study report of April 29, 2009 (Exhibit 107(a)).

A queuing count, typically, is done by someone out in the field identifying either distance or number of vehicles from an ending point, such as a signalized intersection, or a stop controlled intersection. In case of a signal, every time the light turns green for that phase of the signal, the observer would identify what the queue is. For stop controlled intersections, the observer sets a time period. Every time there are vehicles queued there, it is recorded.

The queuing counts showed queues similar to what Mr. Cornelius had observed during field visits. On Bonifant Road, due to the 250 foot distance from Layhill Road to Catoctin Drive, during

peak times, queues sometimes extend from Layhill beyond the intersection with Catoctin Drive. However, during the queuing study, which was 6:30 to 9:30 in the morning, and 4:00 p.m. to 7:00 p.m. in the evening, most times the queue did not extend to Catoctin or beyond Catoctin. For approximately 20 percent of the one minute intervals, in the morning, the period from 6:30 to 9:30 a.m., and 17 percent in the evening from 4:00 to 7:00 p.m., there were queues that extended along Bonifant back to Catoctin Drive. During those times when queues did extend beyond Catoctin, most times they typically disappeared as soon as the signal changed, and then the queue was gone. They therefore didn't cause any significant backups or delays on Catoctin Drive.

The second part of the study recorded the actual queues on Catoctin Drive, and the queuing analysis showed, in the morning peak hour, a maximum of five vehicles were queued on Catoctin Drive at any one time, and the specific data shows that a minute later, that queue was gone. That occurred two times, and a queue of four vehicles occurred two times during that three-hour period in the morning from 6:30 to 9:30. All the rest of the times there were two vehicles or less that were queued on Catoctin Drive.

In the evening peak period from 4:00 to 7:00 p.m., the queuing analysis showed a maximum of two vehicles queued on Catoctin Drive, and most times there were no vehicles. So the queuing analysis showed that there is some queuing on Catoctin, but it is short lived, quickly clears, typically when the signal changes at Layhill and Bonifant Road, and that motorists do not have excessive delays accessing Bonifant Road.

Subsequent to the Planning Board hearing, there was a concern raised by one of the citizens that Petitioner only did one day of queuing counts on Catoctin Drive. So, Mr. Cornelius did two additional days of queuing counts, and those summaries were provided to the record. Once again, they were done in the morning hour, 6:30 to 9:30 a.m., in the evening, 4:00 to 7:00 p.m. They were

conducted on Tuesday, October 20, and Wednesday, October 21, 2009. Everything was summarized in 15-minute increments, with a total summary at the end of each report.

This additional queuing data is very similar to what was found in the original queuing study. There was a maximum queue of four vehicles in the morning peak hour on Tuesday, October 20, 2009, and an average queue for that time period of less than one vehicle. There were similar results in the evening peak hour, a maximum queue of two. On Wednesday, October 21, 2009, a maximum queue of five vehicles was observed in the morning peak hour, with an average queue of less than one vehicle, and in the evening peak hour, similar results, a maximum queue of two, and an average queue less than one vehicle. Thus, the queuing data was very similar to the queuing data that was included in the April 29, 2009, traffic report. The overall volumes contained in the original traffic study, in terms of number of motorists who were exiting Catoctin Drive from 6:30 to 9:30 in the morning, and from 4:00 to 7:00 in the p.m., were consistent with the total vehicles that were observed on October 20th and October 21st. The volumes were very similar all three days.

The data from the queuing observations (Exhibit 147(b)) are attached to Exhibit 147, the November 25, 2009, letter to Shahriar Etemadi of Technical Staff regarding supplemental data and analysis. That exhibit also contains a letter of September 24, 2009, to Mr. Hutt regarding school bus safety (Exhibit 147(a)).

Mr. Cornelius further noted that in the October 2009 follow-up study, his office also recorded times on an “automated traffic count board,” so time delays were recorded, as well as queues. Delays were measured for every motorist who existed Catoctin Drive onto Bonifant Road. Those delays are also summarized by 15 minute intervals and for the full three hour increments in the morning and the evening peak hours.

During the October 20th, 2009, morning peak time frame, the maximum stop time for a motorist was 74 seconds. That is the longest it took someone to pull out onto Bonifant Road. The

average delay for those motorists was just over 16 seconds. It shows that if a driver pulls up right when the queue on Bonifant Road happens to be extending beyond Catoctin Drive, he may have to wait for the signal to change, and he may have a minute wait or possibly a little bit more. But on average, typically the queue is not up to the intersection, and those motorists do not have a difficult time getting out with an average delay of 16 seconds for all motorists on Catoctin Drive trying to get out onto Bonifant Road in the peak period of the morning.

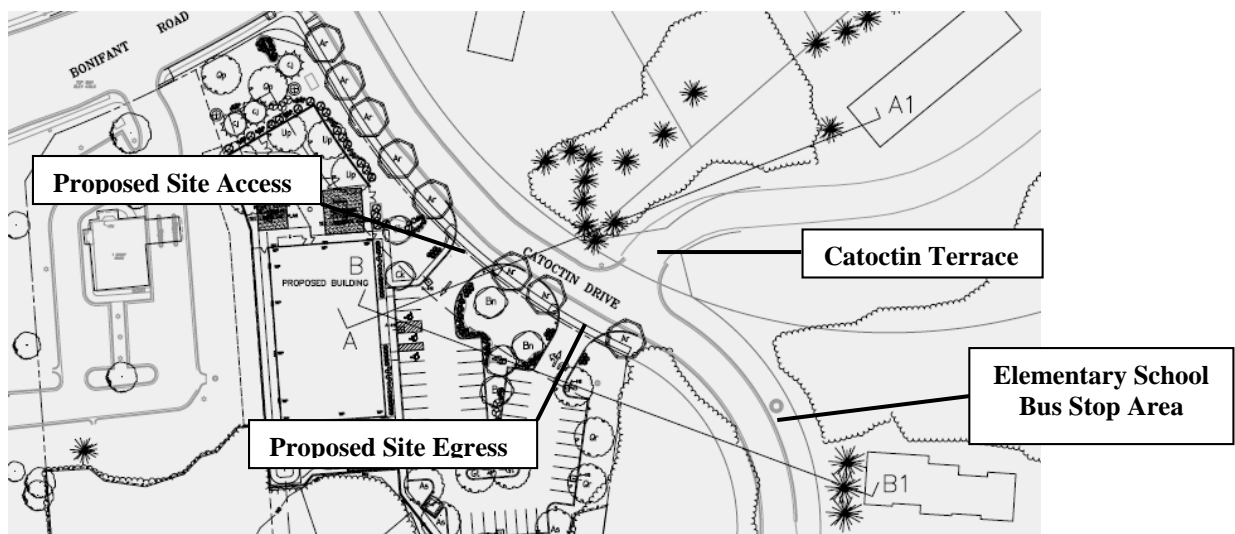
In response to the Hearing Examiner's question as to how he would anticipate this delay and queuing data would change if the special exception is approved, Mr. Cornelius testified that there's no way to calculate exactly what the incremental change will be, but based on the January 6, 2010, letter from Mr. Etemadi of Technical Staff (Exhibit 166), he stated, "it's not expected that the additional traffic [projected to be exiting the childcare facility], these 29 motorists exiting in a peak one-hour period, would add significantly to either the [queuing] or the overall delay for the Catoctin Drive approach to Bonifant Road." 1/15/10 Tr. 52. This is because the queuing and delay study shows that 75 to 80 percent of the time, there are no vehicles on Catoctin Drive, trying to get onto Bonifant Road. Chances are that these motorists would come up to the intersection at Bonifant without any other vehicles there. Thus, probably 50 percent of those people may proceed when there's no traffic there, and will thus not add to the delay to the existing motorists if there is nobody there. The other 50 percent, approximately 15 vehicles, may add to an existing queue, but it will be spread over the course of an hour since in a daycare facility, unlike a school, arrivals are more staggered, with arrivals and departures spread out over a two to three-hour period.

The community also raised concerns regarding the safety of children in the area going to and from the school buses, and their interaction with the proposed childcare facility. These concerns were raised in the testimony of a resident, Lorena Ramirez, who takes her children to the school bus (10/23/09 Tr. 44- 69), and were detailed in BPHOA's testimony (Exhibit 184). These concerns were

addressed by Mr. Cornelius at the hearing (1/15/10 Tr. 53-61), and they triggered his September 24th, 2009, letter contained in Exhibit 147(a).

As explained by Mr. Cornelius, the buses for the middle school and high school do not turn onto Catoctin Drive. When the middle school and the high school buses stop, their lights are flashing. No one can turn into or out of Catoctin Drive if the buses are stopped right at the intersection and their red lights are flashing. When asked on cross-examination whether the proposed use would add to the danger of children waiting in the street near the school bus stop on Bonifant at its intersection with Catoctin, Mr. Cornelius responded that there are thousands of vehicles an hour on Bonifant Road, and the use would add some additional traffic on Bonifant, but it would be a very minimal increase. It would not change the overall volume character of Bonifant Road. On Catoctin Drive, there is very low volume there today, and when you add the childcare facility, it will still be a very low volume. It's still safe for pedestrians, and in fact, the childcare facility is going to construct a sidewalk along its frontage which will make it safer for pedestrians.

Only one school bus (the elementary school bus) comes down Catoctin, and the drop-off and pickup location is about 150 feet south of the intersection of Catoctin Terrace and Catoctin Drive. Because the egress for the subject site is located opposite the intersection of Catoctin Terrace and Catoctin Drive, the elementary school bus stop is also approximately 150 feet south of the egress for the subject site (*i.e.*, well beyond the area where users of the childcare facility have to venture).



The elementary school bus turns down Catoctin Drive, comes all the way down, makes a left turn onto Catoctin Court, backs up into the T-turn around, which is a dead end area, and then pulls up, once again, and children load from that location. While that bus is stopped, and children are loading, traffic can clearly come into and exit a childcare facility, just like traffic can enter and exit Catoctin Terrace, since both of those access ways are 150 feet north of the bus stop area, which is near Catoctin Court. Because vehicles accessing the childcare center (other than those from the Beacon Place Community, itself) will enter Catoctin Drive from Bonifant Road to the north and will never have reason to go south of the site's proposed egress, vehicles accessing or exiting the childcare center should have no interaction with children getting on or off the elementary school bus. Hence, there is no safety concern with people coming into and out of the childcare facility at the time the elementary bus is dropping off or picking up children.

Mr. Cornelius further testified that the proposed one-way on-site circulation pattern will "achieve maximum safety, for both pedestrians and motorists." 1/15/10 Tr. 62. He also opined that Catoctin Drive "is certainly wide enough to accommodate safely two-way traffic. Traffic volumes are very low. With the additional daycare center, that will not change. Traffic volumes will still be volumes that are typical of residential roadways." 1/15/10 Tr. 62. In his opinion, the proposed use will be in harmony with the general character of the neighborhood and would meet the other Code standards, as regards to traffic. There are no residences that access Catoctin Drive between Bonifant Road and Catoctin Terrace, which is directly across from the southernmost driveway of the subject site. Mr. Cornelius also opined that adequate transportation facilities are available to support this proposed child daycare center, and that it would not adversely impact safety.

He looked at accident data for the intersection of Bonifant Road and Catoctin Drive, as well as along Catoctin Drive, and there have been no reported accidents along Catoctin Drive involving pedestrians or motorists for the three-year period. From 2005 to 2007 there was an average of one

accident per year at the intersection of Catoctin Drive and Bonifant Road, which is not a significant accident experience. Therefore, given the existing safe conditions, and based upon the data concerning accidents, it is his opinion that the additional traffic will not change those aspects. 1/15/10 Tr. 80-83.

Mr. Cornelius noted that revisions to the plans which reduced the number of full time-equivalent employees from 25 to 23 and the number of children from 158 to 138 would reduce the number of a.m. peak hour trips from 61 to 57 and evening peak-hour trips from 68 to 63. CLVs may remain the same or go down slightly. His previous conclusions would be unchanged. 4/9/10 Tr. 33-38. He further testified that the proposed use would satisfy Zoning Ordinance §59-G-2.13.1(a)(5), as to traffic and transportation; that the use is compatible with the surrounding uses; and that it will not result in a nuisance because of traffic, parking, noise, or type of physical activity.

BPHOA produced no testimony from experts in the field of transportation planning or traffic engineering; however, it did provide the testimony and analysis of a remarkably astute resident, Peter Zara, who testified as an expert in “environmental and social assessment,” which he described as assessing the impacts of developments on communities. BPHOA also introduced the observations of a number of neighbors regarding traffic issues in the neighborhood, including a video of cars attempting to make the “difficult” left turn from Catoctin Drive onto Bonifant Road.

The communities concerns regarding traffic, parking and safety, and Mr. Zara’s critique of the transportation analysis done by Petitioner’s expert and Technical Staff are contained in Parts 1 through 4 of BPHOA’s written testimony (Exhibits 183-186).

The communities concerns mostly center on increased volume and danger regarding the neighborhood’s sole exit from Catoctin onto Bonifant. Mr. Zara raises a number of interesting points. For example, with a Staff limited to 25, Petitioner was able to apply the County’s LATR standards for projecting the likely number for trips to be generated; however, if there had been 26 staff members

(i.e., just one more), the standards to be applied would have come from Institute of Transportation Engineers' (ITE's) national model¹⁰, which would have yielded double the projected traffic numbers. Mr. Zara believes those figures would be more realistic. 1/22/10 Tr. 135-137, 148.

Mr. Zara also argues that the Inter-County Connector (ICC) opening on Layhill Road not far north of the subject site would result in more traffic on the intersection because it will attract development. He suggests that this added traffic and the traffic generated by the childcare center would have cumulative impacts. Moreover, given the low volume now in his neighborhood, a small expansion would have a big impact. In addition, as discussed above, BPHOA worries about the safety of schoolchildren at the three bus stops in the neighborhood. Exhibits 182-186.

In response, Mr. Cornelius cited to a 2004 study done by the federal Department of Transportation and Maryland's State Highway Administration, regarding the impacts on traffic of the ICC (Exhibit 209(x)). That study projected that the ICC would result in a reduction of volumes at the intersection of Layhill Road and Bonifant of about 17% in the morning peak hour and 22 percent in the evening peak hour in 2010. Moreover, similar numbers are reflected in long term projections for 2030. 4/9/10 Tr. 80-89.

Mr. Cornelius also responded to the opposition's argument that Catoctin is narrow, saying it's actually a typical residential street at 26 feet wide and that children at the elementary school bus stop would not be endangered because traffic from the daycare will not pass them. Regarding the middle and high school bus stops on Bonifant at Catoctin, Petitioner will be adding a sidewalk on the west side of Catoctin and possibly on the east side as part of its PAMR mitigation, which will improve safety. 4/9/10 Tr. 91-97.

Moreover, Mr. Cornelius indicated that even if ITE rates were applied and the number of trips from the proposed use doubled, the intersections involved would still be below the CLV threshold,

¹⁰ Trip Generation, 8th Edition, Institute of Transportation Engineers, pp. 1069-1070.

and the impact on delays would be minimal, since 75% of the time there is presently no queue at the Catoctin/Bonifant intersection. 4/9/10 Tr. 110-119.

Clearly, the testimony and exhibits in this case leave much to be digested when trying to fairly evaluate the likely impact of the proposed use upon the community. While it would not be fair for the Hearing Examiner to apply ITE standards in lieu of the applicable local standards, they do serve to emphasize the need for some additional conditions and follow-up studies to ensure that the traffic projections proffered by Petitioner's transportation planner and accepted by Technical Staff prove to be true before this use is permitted to achieve its full enrollment. A condition to that effect is proposed in Part V of this report.

Nevertheless, based on the present state of the record, and despite the protestations from the community, the actual numbers from all sides (*i.e.*, recorded observations of Petitioner's experts and recorded community observations) show that current queues and delays at the intersection of Catoctin and Bonifant are not inordinate. Moreover, they are not likely to be significantly increased by the daycare center traffic, especially given the reductions in the number of students and after-hour activities to which Petitioner has agreed as a result of the hearing.

The Hearing Examiner reaches his conclusion based not just on the usual LATR and PAMR analysis supplied by Petitioner's experts and Technical Staff in special exception cases, but upon additional queuing and delay studies done at the relevant intersections on more than one day, as outlined above. Without that data, the Hearing Examiner would have concluded that the Petitioner had not sufficiently established "traffic compatibility," as the former People's Counsel labeled it (5/21/10 Tr. 79), even if the adequacy of public facilities had been established in a more global sense. With that data, in spite of the legitimate concerns of the community, it appears that the proposed daycare center can live compatibly with the community.

The Petitioner's interpretation of the impacts of the delay and queuing data is supported by Technical Staff's evaluation of the data. Shahriar Etemadi, Transportation Planning Supervisor, wrote to the Hearing Examiner on January 6, 2010 (Exhibit 166):

1. We concur with the information and conclusions in the study. They support the Planning Board's finding that the proposed use satisfies the adequate public facilities ordinance and will not cause adverse safety effects.
2. The additional traffic generated by the proposed use during periods of school bus activity is less than one car per minute. All school buses picking up or dropping off school children use flashing lights and stop signs per Maryland law that prohibits movement of other traffic when school buses are boarding or alighting the students. The field observations indicate that elementary school students are also accompanied by adults. We do not see any safety concern related to additional traffic from the day care and boarding or alighting of school children in the vicinity of the site.
3. Peak period traffic delays for existing vehicular trips on Catoctin Drive exiting onto Bonifant Road during the morning peak period (6:30 to 9:30 AM) and evening peak period (4:00 to 7:00 PM) suggest that capacity exists to accommodate additional traffic without significantly increasing average delays. The following table summarizes the observations of the study.

Summary Information	AM Peak Period 6:30-9:30	PM Peak Period 4:00-7:00
Total Vehicle Count	117	56
Maximum Queue	4	2
Average Queue	0.18	0.14
Total Time (for all vehicles to clear the intersection)	1882 seconds	1514 seconds
Maximum Stopped Time (of any vehicle)	1.14 minutes	1.36 minutes
Average Stopped Time Per Vehicle	16.09 seconds	27.04 seconds

As shown in the above table, a total of 117 vehicles were exiting Catoctin Drive in the morning peak period taking a sum of 1882 seconds; an average of 16.09 second per vehicle. A three-hour peak period is 10,800 seconds long. The 1882 seconds of queued traffic therefore means that there was no traffic waiting on Catoctin Drive for over 80% of the time during the AM peak period. It is a similar situation in the afternoon peak period. It took 1514 seconds to clear 56 vehicles during 4:00 to 7:00 PM. Again, there was a majority of time that no traffic used Catoctin Drive. It was observed that the longest queue of vehicles in the morning was four and two in the afternoon. These volumes and queuing observations are similar to the data we had seen in the original traffic study dated April 29, 2009, supporting the adequate public facilities findings recommended by the Planning Board.

Moreover, these conclusions regarding the impacts of the delay and queuing data were actually reinforced by some of the key testimony presented by the opposition. When Ms. Walden testified on behalf of the BPHOA, she stated that traffic on Bonifant Road made it exceptionally difficult, during peak hours, to turn left onto that road from Catoctin Drive, but when asked how long those delays were, she testified (1-15-10 Tr. 231):

My experience has been that I sit probably on average 30 seconds to get out. . . .
There are many times that I could say I can sit there a minute, over a minute in time.

When asked “when would you say you average 30 seconds? What time of day would you say that's measured?,” Ms. Walden answered (1-15-10 Tr. 231),

More around those peak hours we're all talking about in the morning and in the evening. When I go out in the middle of the day, it's pretty much, you know, a snap.

Thus, even the chief opponent of the special exception admits that delays in making a turn onto Bonifant during the peak hours average only about 30 seconds, and in the middle of the day, they are “a snap.” The delays demonstrated by a video taken by another neighbor, Dallas Thomason, seemed to show the similar results. 1/22/10 Tr. 6-43. At one point in the video, Mr. Thomason recorded cars turning left onto Bonifant from Catoctin at 4:15 p.m. on a Wednesday afternoon (i.e., during the evening peak period). The delays seemed to range from about 30 seconds to about 60 seconds. 1/22/10 Tr. 15-17.

At another point, Mr. Thomason recorded the same turns, but during the morning peak period on a Wednesday. Those delays seemed to range from about 17 seconds to 45 seconds. 1/22/10 Tr. 26-28. Mr. Thomason also took measurements on other days, which he recorded in Exhibit 179. He reported that the average a.m. peak hour delay in making the left turn onto Bonifant from Catoctin was 19.78 seconds, and the average p.m. peak hour delay in making the left turn onto Bonifant from Catoctin was 39.45 seconds. 1/22/10 Tr. 31-33.

Mr. Cornelius testified on rebuttal that the testimony of Ms. Walden and the data from Mr. Thomason regarding delays at Catoctin Drive were actually consistent with Mr. Cornelius's own findings, and they demonstrate that the current delays are not inordinate for an unsignalized intersection. Based on his review of Mr. Thomason's figures, they amount to an average delay in the morning peak hour of 15 seconds for vehicles turning left onto Bonifant and 8 seconds for right-turning vehicles, for an average delay of all vehicles exiting of about 13 seconds (since 75% of the turns were left turns). The average delay in the evening peak hour was 36 seconds for vehicles turning left onto Bonifant and 16 seconds for right-turning vehicles, for an average delay of all vehicles exiting of about 30 seconds (since 75% of the turns were left turns). 4/9/10 Tr. 66-71.

Mr. Cornelius further noted that, for 75 to 80 percent of the traffic exiting on Catoctin Drive in the peak periods, there were no vehicles sitting there waiting. Thus, most of the traffic that would be generated by the daycare center is likely going to arrive at that road when there is no other traffic from the community coming out. Approximately 25 percent of the new trips will exit the community at the same time as residents. There will be some additional queuing at certain times, but it's not going to be significant because most of the time there is no traffic there. 4/9/10 Tr. 72-73.

It thus appears to the Hearing Examiner that the current traffic conditions do not warrant denial of the special exception. Nevertheless, given the difficulty of predicting the future impacts, even with queuing and delay studies, the Hearing Examiner proposes a condition which will limit enrollment for a period of one year to 100 students on site, and require additional studies under those conditions.

Concerns about parking spilling into the neighborhood were also raised by BPHOA. Mr. Zara indicated that parking is restricted on the west of Catoctin Drive and south of Catoctin Terrace, but it is not restricted on most of the east side of Catoctin, except for that little space, north of Catoctin Terrace. BPHOA feels that the parking situation on the eastern side of Catoctin Drive, down to and

including the northern side of Catoctin Terrace, rises to the level of a non-inherent effect, because parking on the eastern side of Catoctin Drive will restrict the size of the lane, and will cause huge traffic problems along Catoctin Drive. 1/22/10 Tr. 114-116.

Mr. Cornelius stated that drivers using the daycare center would actually park their vehicles and go in to drop-off or pickup their children, and the parking provided is consistent with parking needs at daycare facilities. There is no drop-off area for children because parents will park and walk their children in. Petitioner's land planner, Victoria Bryant, testified that the spacing between the parents is sufficient, and the parking is sufficient; there should be plenty of space for parents to park, walk their children in, and leave. 1/15/10 Tr. 122.

The parking as specified on the site plan exceeds County requirements, because with the reduction in staff to 23 and children on site to 138, the number of required parking spaces has been reduced to 46. Petitioner will provide 52 spaces, which is 6 above what County regulations require. When there is overflow because of special events, Petitioner has committed in its TMP to providing offsite parking and shuttling people. 4/9/10 Tr. 100-102.

While the Board cannot restrict public parking, it can require as a condition of the special exception, that Petitioner restrict its users to the parking lot provided. This rule is embedded in the revised Transportation Management Plan (TMP), which is in the record as Exhibit 209(g). The Introduction to the TMP summarizes its restrictions to ensure safety and reduce the impact of parking on the neighborhood:

. . . Dayhill recognizes that the proposed children daycare facility operations may require its efforts to actively manage traffic circulation through its site and to minimize the impact of its operations on the surrounding area. Dayhill has set forth, in the following document, its policy requiring stopping before exiting the subject property, prohibiting left turns from its property by vehicles during the period of time that the public elementary school bus is engaged (stopped with lights flashing) in a morning pick-up and an afternoon drop-off, prohibiting parking on Catoctin Drive, and providing a penalty structure for violations of this policy. In addition, Dayhill has established parking policies for special events, a monitoring program and an outreach plan to notify the child daycare facility's parents of transportation-related policies.

Technical Staff expressly approved the revised TMP and “recommended adoption of the plan as written.” Exhibit 224. The Hearing Examiner recommends a condition in Part V of this report that will require Petitioner to adhere to and enforce its TMP. The Hearing Examiner concludes, based on his review of the entire record, that transportation, safety and parking considerations should not prevent this special exception from being granted, subject to the conditions recommended in Part V of this report.

6. Waiver Regarding the Width of Five Parking Spaces:

Petitioner requests a waiver to allow five of its parking spaces to be reduced in size, so that it will not have to remove any forest to provide for adequate parking. Technical Staff supported this request, noting that a formal waiver was not needed (Exhibit 119, p. 21):

The application meets the requirements in terms of required on-site parking spaces. The site plan provides a total of 52 parking spaces, including three handicap spaces one of which is van accessible. Five of the parking spaces are compact spaces. The applicant has requested a waiver to allow five of the spaces to be compact spaces. Staff determined that the requested reduction in size for the five spaces does not require a waiver under Section 59-E-4.5 since the Planning Board can allow the compact spaces pursuant to **Section 59-E-2.2.2(e) which specifies that “the Director /Planning Board may permit up to 10 percent of all required spaces to be small car size spaces, only in exceptional cases where the configuration of the site prevents exclusive use of standard space dimensions.”**

The proposed five compact spaces are 9.62 percent of the total 52 parking spaces. The required dimensions for standard compact perpendicular parking spaces are 7.5 ft X 16.5 ft. The proposed five compact spaces are dimensioned at 7.5 ft X 19.0 ft., which is slightly larger (in terms of length) than what is required. Moreover, the southern portion of the property, including the area on which a good portion of the parking spaces will be located, is defined by a downward slope that gradually falls steeply by up to 20%. This area also contains a wetland and a forest conservation area restricting the possibility of expanding the parking area to accommodate all standard size parking spaces. Staff supports the applicant request to allow the five compact spaces.
[Emphasis in original.]

Technical Staff reiterated its support and the Board’s support for the requested waiver in a follow-up memorandum. Exhibit 208. There is really no issue here. The parking waiver is a sensible

way to avoid encroaching onto the forest conservation area, and the significance of reducing the size of five parking spaces has been further diminished by the reduction in the size of the proposed childcare staff and the concomitant reduction in the number of spaces required from 52 to 46. Since Petitioner will be providing 52 spaces, the fact that five of the extra six spaces will be designed for compact vehicles is of no moment to this case. A condition approving the requested waiver has been recommended in Part V of this report.

7. Environment:

According to Technical Staff (Exhibit 119, pp. 10-11):

. . . the property contains 0.89-acres of forest onsite and nine large or specimen trees. There is a small pocket of remnant wetlands on-site with associated buffers. This wetland is the headwaters of a partially piped stream, which outfalls on the east side of Catoctin Drive. All unforested areas of wetlands and wetland buffers will be planted with a compatible mix of species. All forest and wetland buffers will be covered by a Category I forest conservation easement, except for areas of WSSC storm-drain easements. . . .

A Preliminary Forest Conservation Plan (Exhibit 116(g)), incorporating these provisions, has been approved by the Planning Board (Exhibit 195). Environmental Planning Staff noted the following about the Plan:

This plan does not propose to remove any trees having a diameter measured at 4.5 feet above the ground of:

- (1) 30 inches or more, or
- (2) 75 percent or more of the diameter, measured at 4.5 feet above the ground, of the current State champion tree of that species as designated by the Department of Natural Resources.

In addition, there are no trees, shrubs, or plants determined to be rare, threatened, or endangered under:

- (1) The federal Endangered Species Act of 1973,
- (2) The Maryland Nongame and Endangered Species Conservation Act, Natural Resources Article, §§10-2A-01—10-2A-09, Annotated Code of Maryland, and
- (3) COMAR 08.03.08;

Also, there are no trees that:

- (1) Are part of an historic site,
- (2) Are associated with an historic structure, or
- (3) Have been designated by the State or the Department as a national, State, or county champion tree.

The BPHOA indicated its concern was to avoid the removal of trees that would provide screening for the community. Exhibit 191. Technical Staff has stated that there would be adequate screening (Exhibit 119, p. 2), and more has been added to the plan as a result of the hearing. Staff also noted that no waiver of any of the provisions of Chapter 22A, Forest Conservation Law, is required for approval of this development. Exhibit 119, p. 11.

Stormwater management was discussed by Technical Staff in its report (Exhibit 119, p. 11), and at the hearing by James W. Hendricks, Petitioner's expert in a civil engineering. Mr. Hendricks prepared the stormwater management concept plan (SWMCP), which was approved by the Department of Permitting Services (DPS) in a December 11, 2008 letter (Exhibit 174).

Under the current SWMCP, there would be two underground sand filters, which will receive water draining off of the parking lots. Ground water recharge will be handled by the use of underground dry wells in the playground area. Water would get piped from the rooftop to an underground trench filled with stone. The water gradually gets back into the groundwater table. Because the one-year storm generated less than two cubic feet per second of runoff, water quantity control was not required. 1/15/10 Tr. 190-195.

However, as noted by Technical Staff, new Maryland regulations on stormwater management have caused DPS to issue the following advisory:

Maryland Department of the Environment (MDE) regulations require that all final sediment control and stormwater management plans approved on or after May 4, 2010 must comply with the most recent changes to the Maryland Stormwater Design Manual. After that date, previously approved stormwater management concept plans are no longer valid unless they have been designed to the new standards or have been reconfirmed by the Department of Permitting Services.

Technical Staff indicated that this special exception will require subdivision approval, and the final stormwater management plans will have to be reviewed at that time. As required by statute, the recommendation for approval of this special exception is conditioned upon approval at subdivision.

No environmental issues were raised in this case that would prevent approval of the special exception petition.

E. Community Response

As mentioned at the outset of this report, the petition is strongly opposed by the community. Approximately 77 letters in opposition were filed,¹¹ and the Beacon Place Homeowners Association (BPHOA) participated vigorously in opposition throughout these proceedings. Martin Klauber, the former People's Counsel, also opposed the petition based on a legal argument which is discussed in Part IV. A. of this report.

The opposition letters recite a number of concerns, but central to the opposition are two factors – the size of the proposed operation and the fact that its only access will be on Catoctin Drive, which also serves as the Beacon Place community's only vehicular access to the outside world. Thus, the issues of traffic volume, delays and safety are key here. They were discussed at length in Part II. D. 5. of this report, and need not be repeated here.

The opposition also raises issues about potential noise, increased number of strangers passing through the neighborhood, the visual impact of the parking lot and the cutting of trees. At the hearing, the opposition additionally discussed concerns about the size of the proposed building and what they characterized as the commercialization of their residential neighborhood.

Initially, it must be said that a child daycare center use for more than 30 children, as specified

¹¹ Opposition letters are contained in Exhibits 24, 25, 27, 29-70, 73-97, 103, 110(p), 114, 121 and 125. The letter at Exhibit 110(p) is from BPHOA itself. The vast majority of the other opposition letters consist of a form provided by BPHOA and completed by individual residents of the neighborhood. The form letter provides boxes to check off the issues of concern and space for individual comments.

by Zoning Ordinance §59-G-2.13.1(b), is expressly permitted in the R-200 Zone by special exception, pursuant to §59-C-1.31(d). Many of the concerns raised by the neighbors relate to effects that would be inherent in any childcare facility on the site, and thus it is legally presumed, pursuant to Zoning Ordinance §59-G-1.2.1, that they alone are not sufficient to defeat this petition. As stated in §59-G-1.2.1, *“Inherent adverse effects alone are not a sufficient basis for denial of a special exception.”*

In other words, all childcare facilities for more than 30 children will require a building, an outdoor play area and a lighted parking facility. As such, they will create some noise and some additional traffic from employees and users of the service, and in a sense, some commercialization of the neighborhood. They will also bring some strangers to the neighborhood to drop off their children. None of these expected adverse effects, in and of themselves, can legally warrant the denial of a special exception, since the Zoning Ordinance recognizes that these effects will occur and nevertheless permits this use in the R-200 Zone, under specified conditions.

On the other hand, Zoning Ordinance §59-G-1.2.1 recognizes that there may be adverse effects that are not inherent in every childcare facility of this type, and the Code specifies, *“Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.”* The Zoning Ordinance defines “Non-inherent adverse effects” as *“physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.”*

As admitted by Petitioner’s own land planner, Victoria Bryant, the after-hours programs proposed by the Petitioner and the fact that Catoctin Drive is not a through road are non-inherent characteristics relating to this petition. 1/15/10 Tr. 122-123. The opposition argues that the size of the proposed building and operation, as well as the width of Catoctin Drive, are also non-inherent characteristics of this proposal. The Hearing Examiner agrees that, although Catoctin Drive may be a

normal width for a residential street, as testified by Petitioner's transportation planner, the whole vehicular access configuration in this case (*i.e.*, the combination of Catoctin Drive being the neighborhood's only vehicular access, its width, its proximity to the major intersection of Layhill and Bonifant Roads, and the proposed size of the operation) creates non-inherent adverse characteristics at this site.

That being said, this finding does not require the rejection of the special exception petition, if conditions can be imposed which will reasonably reduce the impacts of these characteristics so that they do not create undue adverse effects on the neighborhood. Many such conditions have been recommended by the Hearing Examiner in Part V of this report, and a number of these conditions are already incorporated into the TMP and Statement of Operations agreed to by the Petitioner.

Moreover, Petitioner has made a number of changes in its proposal as a result of the hearing in this case. Most importantly, it has reduced the proposed enrollment from 158 children to 138 on site at any one time, and has reduced the number of proposed full-time-equivalent staff from 25 to 23. Petitioner also reduced the size of the proposed building from 9,728 square feet to 9004 square feet, and has significantly reduced the number of after-hour activities planned for the site.

Ms. Bryant also introduced revised lighting and photometric plans (Exhibits 148(e) and (f)), lowering the height of the light fixtures from 20 feet to a more residential scale of 12 feet, as suggested by the Hearing Examiner and approved by Technical Staff. 1/15/10 Tr. 100-106.

According to Ms. Bryant, the proposed building and the closest playground will be 360 feet from the nearest townhouse building. It will also be 245 feet from the townhouse to the closest access to the site; 405 feet from the dumpster, 280 feet to the closest light fixture, and 285 feet to the closest parking space from Catoctin Terrace. 1/15/10 Tr. 110-111. Ms. Bryant mentioned that the closest playground is between 130 and 200 feet from any of the residences. It is within a sight-tight fence, which is a solid wood fence. Sound travels and it will go through the plant material, but the

The Hearing Examiner finds, given the distances and screening provided, and operational limits imposed by the revised TMP (Exhibit 209(g)) and the Statement of Operations (Exhibit 223(a)), that neither the parking lot nor the playground areas will impose an undue adverse effect upon the neighborhood due to noise, lighting and user activity.

The Planning Board responded to the citizen concerns with a number of recommended conditions and some suggestions for the Board of Appeals, one of which (*i.e.*, the first one) was quite unusual. Memorandum dated October 15, 2009 (Exhibit 126). The Planning Board's suggestions are:

1. That the Board of Appeals use its influence with the State Highway Administration and the County's Department of Transportation to encourage them to promote a safer and more efficient traffic flow at and near the intersections of Layhill Road and Bel-Pre Road and Catoctin Drive and Bonifant (Bel-Pre) Road by focusing on the following:
 - (a). Improve signal timing at the intersection of Layhill and Bel-Pre Roads, looking particularly at right-turns from Layhill onto Bel-Pre Road.
 - (b). Determine whether or not the installation of a traffic signal at the intersection of Catoctin Drive and Bonifant Road would improve safety and mobility at the intersection, in particular, regarding the left turn from Catoctin Drive onto Bonifant Road.
 - (c). Employ any possible workable alternatives and strategies that should be pursued to accomplish a safe and well coordinated traffic flow at and near the two intersections.

In supporting the application, Commissioner Presley also indicated that absent a satisfactory resolution to the above referenced issues at the time of the Board of Appeals public hearing, her position would be that the traffic issues would rise to the level of a non-inherent adverse effect.

2. That a transportation management plan, agreed upon by the applicant and the community, be drawn up to monitor and address issues and concerns related to school bus and daycare traffic.
3. That the Peoples Counsel forms a Community Liaison Committee representing the households in the Beacon Place townhome development located southeast of the subject property and the Beacon Place Citizen Association to monitor problems that may occur as a result of the day care operations.

The Hearing Examiner cannot join in the Planning Board's suggestion "That the Board of Appeals use its influence with the State Highway Administration and the County's Department of

Transportation . . .,” because the Zoning Ordinance does not authorize the Board of Appeals to “use its influence” on other governmental agencies, except by adopting resolutions pursuant to Code §59-A-4.123 to decide cases before it under §59-A-4.11. However, the other suggestions are very sensible, and were pursued at the hearing. As a result, there is a proposed transportation management plan, and the former People’s Counsel outlined the contours of a proposed Community Liaison Council (5/21/10 Tr. 80-81), both of which are recommended in conditions contained in Part V of this report.

The Planning Board also recommended the following conditions:

1. The applicant must meet the following conditions before MCDPS issuance of a sediment and erosion control permit, as appropriate:
 - a. Approval of Final Forest Conservation Plan consistent with the approved Preliminary Forest Conservation Plan prior to any clearing, grading or demolition on the site.
 - b. A Final Sediment Control Plan must be consistent with final limit of disturbance as approved by M-NCPPC staff.
 - c. A Final Forest Conservation Plan must include an invasive management plan to remove and control Siberian elms and other invasive species, including multiflora rose, oriental bittersweet, and Japanese honeysuckle.
2. Applicant must place a Category I conservation easement over all retained and planted forest.
3. The child day care use must be limited to 158 children and with the total number of staff not exceeding 25 full-time equivalent.
4. Hours of operation for the day care center are limited to 6:30 a.m. to 6:30 p.m. Monday through Friday, 12 months a year. Events such as an open house, parent/instructor meetings, and special events may occur only between the hours of 9:00 a.m. and 2:30 p.m. on weekends and no later than 9:00 p.m. weekdays.
5. No playground activity will occur prior to 8:30 a.m. or after 5:30 p.m. The actual time period for each age group and the number of children in each age group may change periodically depending upon enrollment and applicable program curriculum. However, no more than 88 children shall occupy the three (3) playgrounds at any one time.
6. The adequacy of public facilities must be determined by the Planning Board at the time of subdivision review in this case.

With some modifications, these and other conditions, have been recommended in Part V of this report or incorporated into the TMP and Statement of Operations to address the community’s concerns.

BPHOA has suggested a number of conditions, if the special exception is granted (Exhibit 230(a), last two pages). For the most part, their requested conditions are not viable.

The Board cannot require an entrance to the childcare facility on Layhill Road because the bank which owns that property has refused to permit it. Exhibit 222. Petitioner's representative, Philip Mitchell, testified that the Sandy Spring Bank has repeatedly refused to allow the childcare center to have access across their property to Layhill Road because it would interfere with their business, as indicated in an e-mail from a senior vice president of the Bank (Exhibit 222). 4/9/10 Tr. 152-159. On cross-examination, Mr. Mitchell explained that he had originally raised the access issue with the bank and received an oral rejection. He raised the issue again to get something in writing. 5/21/10 Tr. 7-16. There are also engineering questions related to this suggestion (Exhibit 229). 10/23/09 Tr. 92.

Dramatically reducing the childcare center's maximum enrollment, as requested by the opposition, could result in a facility inconsistent with the franchisor's economic model, according to the unrebutted testimony of Kiddie Academy's representative, Chris Commarota. 10/23/09 Tr. 108. Nevertheless, the Hearing Examiner has recommended a significant reduction in the initial maximum (down to 100) until the impact on the community can be tested, as will be discussed below.

Traffic signal changes sought by the opposition are not within the purview of the Board of Appeals; however, BPHOA can pursue these suggestions with the Planning Board at subdivision and with the MCDOT and SHA.

Staggered arrivals enforced by contracts with individual daycare users has been suggested by the opposition and is strongly opposed by Petitioner. According to the evidence Petitioner presented, such contractual arrangements are unnecessary because in an operation this size, such staggered arrivals occur as a matter of course. Mr. Commarota testified that the parents begin dropping off at 6:30 a.m., and peak drop off starts at about 7:00. At a typical academy, and this location falls into

that category, parents arrive in 10 minutes intervals. They project a maximum of nine parents dropping off at any given interval in the morning. It is not controlled by the contracts of the parents, but is consistent with locations throughout the country. 10/23/09 Tr. 120. Projected drop-off and pick-up times and parking are listed in Exhibit 135 (later amended in Exhibit 217).

Given Petitioner's evidence on this point and the need for a review of the traffic situation by the Board after a year of operations, the Hearing Examiner believes that this issue can be re-examined at that time if the empirical evidence demonstrates that arrivals are not occurring on a staggered basis.

The review provision recommended by the Hearing Examiner in Part V of this report is as follows:

The Board will retain jurisdiction to monitor impact of operations upon the community. During the first year of operations, Petitioner may not exceed an enrollment of 100 children on site at any time. Towards the end of that period, Petitioner must have a traffic study done to determine delays and queuing at the intersection of Catoctin Drive and Bonifant Road during the three-hour peak weekday periods of two typical days. The results of the traffic study, which should indicate the number of children in attendance on each studied day, must be shared with BPHOA and filed with the Board of Appeals. The Board will thereafter schedule a work session to determine whether conditions are such that Petitioner may increase the number of children on site at any time to 138, the full number requested by Petitioner.

As mentioned earlier in this report, the Hearing Examiner has also recommended a condition reducing the number and size of signs permitted on the site. The number of special events has been limited and concerns about potential noise generated by activities on the site have been addressed in various provisions of the revised Statement of Operations (Exhibit 223(a)). The provisions related to noise specify:

7. Deliveries- All deliveries are expected to occur only during week days. Food deliveries are expected to occur once a week. Supplies and equipment deliveries are expected to occur once every other week. Except for Special Events such deliveries will occur between 9:00 a.m. and 3:00 p.m.

8. Trash Collection- Collection is expected to occur once a week during week days. Such collections will occur between 9:00 a.m. and 3:00 p.m.

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12. Playground Activity: Except for a one-time Grand Opening on a Saturday (between 10:00 a.m. and 3:00 p.m.), no playground activity will occur prior to 8:30 a.m. or after 5:30 p.m. The actual time for each age group and the number of children in each age group may change periodically depending upon enrollment and applicable program curriculum. However, no more than 88 children shall occupy the three (3) playgrounds at any time.

13. Outdoor Music and Amplification of Sound: There will be no playing of outdoor music or sound amplification.

14. Maintenance and Routine Landscaping: Routine landscaping care is expected to occur once a week during the appropriate season(s) of the year. Such activities will occur between 9:00 a.m. and 3:00 p.m.

The Hearing Examiner has also recommended a condition to control noise and off-site parking during construction of the daycare center. While these steps may not eliminate all noise from the proposed facility, a certain amount of noise must be considered inherent in the operation of any day care. The recommended conditions should reduce any such problems to reasonable proportions so that they will not adversely affect the neighbors.

The Hearing Examiner realizes that the neighborhood, as represented by BPHOA, opposes this special exception; however, the case law specifies that the decision on a special exception application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Petitioner’s proposal against the specific criteria established by the Zoning Ordinance. The evidence produced by both sides must be considered in that analysis, but the facts and the law ultimately determine whether a special exception petition should be granted. As discussed above and in Part V of this report, the Hearing Examiner finds that the petition satisfies the criteria for the special exception sought in this case.

In sum, although the community has raised some legitimate concerns, they do not warrant denial of the subject petition. They do warrant the imposition of special conditions which have been discussed in order to limit any potentially adverse consequences.

III. SUMMARY OF THE HEARING

There were six days of hearings in this case – October 23, 2009, November 20, 2009, January 15, 2010, January 22, 2010, April 9, 2010 and May 21, 2010. Petitioner called six witnesses at the hearing, Philip Mitchell, managing member of Baron Investments, LLC and Dayhill, LLC; Victoria Bryant, a land use expert; Chris Commarota, Vice President of Construction for Kiddie Academy, the franchisor; Milena Mattingly, joint owner (with her husband Garrett) of AMG, LLC, the franchisee and proposed operator of the facility; Mickey Cornelius, an expert in transportation planning; and James W. Hendricks, a civil engineer.

The former People's Counsel, Martin Klauber, Esquire, participated in the proceedings but did not call any witnesses. The opposition was lead by the Beacon Place Homeowners Association (BPHOA). Peter Zara and Janice Walden, testified individually and on behalf of BPHOA. The testimony of BPHOA, consisting of eleven parts and an introduction, was also submitted, replete with photographs, in Exhibits 182 through 194. Additional opposition witnesses were nearby residents, Lorena Ramirez, Dallas Thomason and Dolores Ustrell.

At the beginning of the session on January 15, 2010, the parties argued the issue of whether the nature of this petition was more akin to a child care facility or a private educational institution. 1/15/10 Tr. 5-42. This issue came up repeatedly during the hearing, and is addressed in Part IV.A. of this report.

A. Petitioner's Case

1. Philip Mitchell (10/23/09 Tr. 74-83 and 85-99; 4/9/10 Tr. 152-159; 5/21/10 Tr. 7-16):

Phillip Mitchell testified that he is the managing member of both Baron Investments, LLC, a holding company, and Dayhill, LLC. Baron Investments, LLC is the contract purchaser of the subject site, and it assigned its rights to Dayhill, LLC, which will own the property. 10/23/09 Tr. 74-75. Dayhill has a lease contract with AMG, LLC and the Mattinglys, who will operate the facility

under a franchise arrangement with Kiddie Academy. 10/23/09 Tr. 76. Kiddie Academy is a national daycare provider and franchisor. 10/23/09 Tr. 77.

Mr. Mitchell described the locations of the school bus stops and described the subject site. He testified that the Sandy Spring bank had denied his request to gain access to the special exception site through the bank property, and “due to site constraints the engineer also recommended it would not be feasible.” 10/23/09 Tr. 92.

On rebuttal, Mr. Mitchell testified that the Sandy Spring Bank has repeatedly refused to allow the childcare center to have access across their property to Layhill Road because it would interfere with their business, as indicated in an e-mail from a senior vice president of the Bank (Exhibit 222). Mr. Mitchell further testified that he researched the size of the Giant Supermarket on Layhill which opposition witnesses had said was only 10% larger than the proposed daycare building, and he found that it was 24,774 square feet, two and a half times the size of the proposed daycare building.¹² 4/9/10 Tr. 152-159. On cross-examination, Mr. Mitchell explained that he had originally raised the access issue with the bank and received an oral rejection. He raised the issue again to get something in writing. 5/21/10 Tr. 7-16.

2. Victoria Bryant (10/23/09 Tr. 83-84 and 209-252; 1/15/10 Tr. 99-185; 4/9/10 Tr. 12- 20, 38-55, 159-187)

Victoria Bryant testified as an expert in landscape architecture and land planning. She and her staff prepared the NRI/FSD, the PFCP, landscaping plan and the land planning report. Ms. Bryant described the site and its topography, noting that the northern end of the property is a fallow piece of the property, so it makes more sense to try and put as much of the building and the parking on the northern end of the building. Also there is an environmentally sensitive area at the southern end, with existing forest that the master plan recommends retaining, as much as possible.

¹² Mr. Zara admitted that the opposition had made a mistake in characterizing the Giant building as being 11,000 square feet. Exhibit 210.

Ms. Bryant also discussed the its zoning and planning history. The 1970's Aspen Hill master plan had proposed a library on the site, but the 1994 Aspen Hill Master Plan identified the property as the Sandy Spring Bank property, area 11, and proposed a CT zone for the bank portion, keeping the R-200 for the special exception portion and explicitly recommending a daycare center for the site.

The master plan recommended that access be provided along Catoctin Drive and not on Bonifant or Layhill, to provide improved access onto Bonifant Road in either direction. Ms. Bryant interprets that language as saying that there should not be an entrance on Layhill or Bonifant for the proposed childcare center. An entrance on Bonifant would be too close to the intersection, and any entrance on Layhill would encourage u-turns. To get access on Layhill would require permission from the bank to cross their property, and to create a new entrance. Mr. Etemadi was pretty sure that the State Highway would reject that. Ms. Bryant felt that the civil engineers would concur that it would not be easy to get an additional entrance approved that close to the existing bank entrance on Layhill Road.

Ms. Bryant agreed with Technical Staff's definition of the boundaries of the general neighborhood, and she described the surrounding area as including two C-1 commercial strips, a PD-7 townhouse development, a school, some additional commercial across Bonifant on the northeast quadrant of Layhill Road, as well as the Beacon Place townhouse development, the bank on the corner, the Sandy Spring Bank, and some single family homes just south of the site. 10/23/09 Tr. 227.

Ms. Bryant described the proposed 9,728 square-foot building, the playgrounds, parking lot, landscaping and signage, as shown in the site and related plans. She stated that the building itself is about the size of a stick of eight townhouses. It's a little wider footprint, but it is in scale with a stick of townhouses. It doesn't look like a townhouse. It has a more of a residential schoolhouse look to it, but it is on the same scale as a townhouse in terms of its footprint. 10/23/09 Tr. 237-238.

According to Ms. Bryant, the parking waiver request is only to reduce the width of five parking spaces so that Petitioner would not have to encroach upon the forested region to the south of the site. 10/23/09 Tr. 238-239.

Ms. Bryant noted that Petitioner is proposing to provide a five-foot concrete sidewalk the full length of the project along Catoctin Drive, as part of its subdivision (*i.e.*, having nothing to do with its PAMR obligations). It will provide a much needed pedestrian link out of the community.

Ms. Bryant described the light fixtures as poles with cutoff shoebox fixtures that direct the light down. 10/23/09 Tr. 244-245. The Hearing Examiner asked Ms. Bryant to consider shortening the 20-foot light poles, since they are in a residential area.

Ms. Bryant further testified that the forest conservation plan is for the whole 3.07 acres. The gray area to the south is the 73 percent of the forest on site that will be saved. Petitioner will be staying out of the wetland buffer, and doing some additional supplemental plantings to the south to help an area of the forest that is not in as good of health as it could be. Petitioner will provide a significant amount of landscaping around the parking that's close to the right-of-way to shade the parking. Also, Petitioner will provide street trees, a lot of shade trees, some ornamental plantings at the base of the building and in the island of the parking lot, as well as landscaping around the wooden fence and retaining wall at the southern end of the building to help soften that look, and some additional landscaping at the monument sign, at the front yard, along Bonifant. 10/23/09 Tr. 251-252.

Ms. Bryant introduced and described revised lighting and photometric plans (Exhibits 148(e) and (f), lowering the height of the light fixtures from 20 feet to a more residential scale of 12 feet, as suggested by the Hearing Examiner and approved by Technical Staff. 1/15/10 Tr. 100-106. She also provided an Illustrative Cross Sections Plan (Exhibit 148(g), showing lines drawn to neighborhood

structures. This Plan references sections (later filed in Exhibit 219(a)), depicting the landscaping separating the site from the nearest residences.

According to Ms. Bryant, the proposed building and the closest playground will be 360 feet from the nearest townhouse building. It will also be 245 feet from the townhouse to the closest access to the site; 405 feet from the dumpster, 280 feet to the closest light fixture, and 285 feet to the closest parking space from Catoctin Terrace.¹³ 1/15/10 Tr. 110-111.

Ms. Bryant described her observations of the school buses and features of the proposed building and parking lot. She also opined that there are nine inherent impacts of the daycare facility: the building, parking, lighting, noise (typically by the children), drop-off and pickup, outdoor play areas, long hours, the number of employees, and the vehicle trips. 1/15/10 Tr. 119. She considers the after-hours programs and the fact that Catoctin Drive is not a through road to be non-inherent characteristics of the site. 1/15/10 Tr. 122-123..

Ms. Bryant mentioned that the closest playground is between 130 and 200 feet from any of the residences. All of them have a sight-tight fence, which is solid wood fence. Sound travels and it will go through the plant material, but the fence will reduce the volume, and the retaining wall on the northern end will dissipate the sound. They are well screened, well hidden to mitigate their visual impacts, as well. 1/15/10 Tr. 121-122.

There is no drop-off area for children because parents will park and walk their children into the building. In Ms. Bryant's opinion, the spacing between the parents is sufficient, and the parking is sufficient. There should be plenty of space for a parent to park, walk their child in, and leave. At this particular facility, the parents have to park and walk their children into the school. 1/15/10 Tr. 122.

¹³ Some of these figures were corrected in the later submission of Petitioner's revised "Distance Exhibit" (Exhibit 223(c)).

Ms. Bryant reviewed the requirements for this special exception and opined that the proposal met them, 1/15/10 Tr. 129-143. Ms. Bryant noted that the Aspen Hill Master Plan supports the construction of a daycare facility on this site. The Master Plan also goes on to say that the need for daycare in Aspen Hill is slightly above the average for the rest of the County, that the residents in this area prefer a daycare center over a home-based type facility, and that infant and toddlers were identified as being of great need in the area. This facility provides all of those, so it is very consistent with what the Master Plan recommends, in her opinion. 1/15/10 Tr. 131-132. There are also adequate public facilities to serve the use. 1/15/10 Tr. 137.

Ms. Bryant also described the surrounding area, and indicated that the proposed use would be a good transition from the nearby commercial uses to the residential uses in the neighborhood. 1/15/10 Tr. 132-134.

According to Ms. Bryant, the building will be designed with residential features such as hip roofs, brick façade and residential style windows. She opined that the building would be compatible and the parking would be adequate. Also the lot contains 511 square feet per child. 1/15/10 Tr. 140-142. Ms. Bryant also testified that the proposed building would be, in some ways, similar in scale and mass to a stick of eight townhouses; it would have a larger footprint (75 feet by 120 feet), but it would be lower (30 feet). 1/15/10 Tr. 179-183.

Ms. Bryant took the stand again to describe changes to the proposed building, which was reduced by 724 square feet by moving the eastern wall (*i.e.*, the front of the building) inward five feet and the northern wall, which faces Bonifant, inward one foot. That amounted to a 7.44% reduction in the size of the building and reduced building lot coverage from 12 to 11.1%. These changes would also made the new sidewalk along Catoctin larger. Additional landscaping would be added, as shown in a revised landscape plan. 4/9/10 Tr. 12-20.

Ms. Bryant further testified that the changes in the structure will increase the setbacks and distances from the nearest residences. She also indicated that the additional landscaping would provide screening for cars using the parking facility. 4/9/10 Tr. 39-55.

On rebuttal, Ms. Bryant addressed Master Plan compliance and compatibility issues that had been raised by the opposition. 4/9/10 Tr. 159-187.

3. Chris Commarota (10/23/09 Tr. 99-139 and 167-208; 4/9/10 Tr. 9-10, 21-32):

Chris Commarota testified that he is the Vice President of Construction for Kiddie Academy Domestic Franchising, LLC. He described Kiddie Academy as follows (10/23/09 Tr. 104):

Kiddie Academy is an education-based childcare provider. Our curriculum is the focus of how we educate children. We provide on a regular basis, excuse me, our franchisees provide to parents' children a morning snack, afternoon snack and hot lunch.

Part of our program is educating a child to learn through play experience. Part of their time is spent in the building, and part of their time is spent outside, outdoors in the adjacent playground.

Kiddie Academy awards license agreements to franchisees, such as the Mattinglys (*i.e.*, AMG, LLC), to operate Kiddie Academy Childcare Learning Centers throughout the country under its brand. Kiddie Academy is headquartered in Maryland, but has more than 100 franchises operating throughout the country, in 22 states. The franchise agreement has requirements within it that the franchisee has to follow, and there is an operations manual.

Kiddie Academy, in its review of potential locations, looks for a population base of 50,000 people within a five-mile radius, with 6 percent younger than age four. It also likes the location to be near commuter routes so that it's easily accessible for the public. In his opinion, this location meets or exceeds those requirements.

In answer to the Hearing Examiner's question, Mr. Commarota testified that Kiddie Academy does not have a minimum or maximum on the number of children for one of its facilities; rather, it is dependent upon the business model and the location. There are a lot of factors that play into it.

For example, tuition rates, rental rates, and the cost of doing business. Mr. Commarota estimates that the smallest Kiddie Academy has 75 children, and the largest has 225. 10/23/09 Tr. 105-106. If this particular one were smaller than proposed, it might not meet the franchisor's business model.

10/23/09 Tr. 108.

Mr. Commarota further testified that Kiddie Academy provides training for the franchisee, who must be licensed by the state. Mr. Commarota described the proposed layout of the building, including its floor plan (Exhibit 133). He also introduced a summary of state requirements (Exhibit 134), and indicated that the space allocated would meet those requirements. He stated that there will be 25 staff members, which would include two administrators.

According to Mr. Commarota, child care is provided from 6:30 a.m. to 6:30 p.m. The parents begin dropping off at 6:30, and peak drop off starts at about 7:00. At a typical academy, and this location falls into that category, parents arrive in 10 minutes intervals. They project a maximum of nine parents dropping off at any given interval in the morning. It is not controlled by the contracts of the parents, but is consistent with locations throughout the country. 10/23/09 Tr. 120. Projected drop-off and pick-up times and parking are listed in Exhibit 135 [later amended in Exhibit 217].

Parents are required to park on site or, in some instances, walk their child from a location, from their home. They must enter the building into the vestibule, and then enter a pin number that's assigned to them to release a door lock and gain access to the facility. The parents are then required to escort their child to the appropriate room, drop off their child, and then exit the building. Afternoon is similar, in that the parents will enter the building, enter their pin code, go to the room where their child is being cared for, and pick up their child, exit the building, and then leave the property.

Exhibit 136 is an illustrative outdoor play schedule for this location. There will be no outdoor play before 8:30 a.m. or after 5:30 p.m. Mr. Commarota also discussed plans for lighting and

signage. There would be an internally lighted monument sign and two wall signs, a portion of which would be illuminated. They are displayed in Exhibit 139.

Mr. Commarota further testified that food deliveries typically occur once a week, and supplies, equipment, and paper products typically are delivered once every other week. Trash pickup typically occurs once a week. There are also “special events,” typically linked to holidays. There may be a grand opening type of event, just shortly after the academy actually opens. There are open house events that may occur once a month, and there may be a Friday-night type of event for parents who want to get out and drop their children off somewhere for a short period of time, typically, once a month. Typically, the franchisee will hire a janitorial service to clean the building once a day, after hours.

On cross-examination by Janice Walden of BPHOA, Mr. Commarota was asked whether the proposed use was a daycare center or a school. He replied that Kiddie Academy’s curriculum is not accredited through Maryland Department of Education and that it does not follow the same procedures as schools. 10/23/09 Tr. 194-200. When pressed about language on Kiddie Academy’s website describing an education philosophy with an age appropriate curriculum and education-based childcare programs, Mr. Commarota replied (10/23/09 Tr. 196):

It's beyond just babysitting . . . and putting the child in front of a television set, for lack of a better description. So as I testified earlier, we are an education-based childcare provider.

Mr. Commarota further testified that plans for the proposed building had been revised, and the new size of the building would be 9004 square feet, a reduction of 724 square feet. This change eliminated one classroom and slightly increased the size of the playgrounds. 4/9/10 Tr. 9-10. The number of children would be reduced from 158 to 138, and the number of staff from 25 to 23 full time-equivalent employees. This will reduce the number of trips by 2 cars per 10-minute interval, based on operations at their other 106 locations, as shown in Exhibit 217, a projection of parking and

parents' pickups and drop-offs. The impact of the changes is shown in Exhibit 218. 4/9/10 Tr. 21-32.

4. Mickey Cornelius (10/23/09 Tr. 139-159; 1/15/10 Tr. 43-96; 4/9/10 Tr. 32-38, 66-152; 5/21/10 Tr. 16-21, 63-66):

Mickey Cornelius testified as an expert in traffic engineering and transportation planning. He described the surrounding area road system and the traffic study he did in this case. Just to the north of the site, Bonifant Road traverses in an east direction from Layhill Road; it becomes Bel Pre Road on the west side of Layhill Road. Bonifant Road is a two-lane roadway to the east of the property. It widens as it approaches the intersection of Layhill Road to provide three lanes accessing the signal. There are two lanes proceeding eastbound on Bel Pre Road, across Layhill Road, that, in fact, merge into a single lane just to the east of Catoctin Drive. The intersection of Layhill Road and Bel Pre Road is signalized. Layhill Road (Maryland 182) is a north-south road, just to the west of the property.

The subject site is accessed off of Catoctin Drive, which is approximately 250 feet east of Layhill Road, along Bonifant Road. The land use is primarily residential to the east and south of the subject property. Commercial is located along Layhill Road, and at the intersection of Bonifant Road, on the north side of Bel Pre Road. Beyond that, it transitions back into residential.

Mr. Cornelius's company prepared a transportation report for the subject application, which was updated on April 29, 2009 (Exhibit 107(a)). Park and Planning Commission's transportation planning staff provided the scope of the study, which initially included three intersections – Bonifant Road at Layhill Road, Layhill Road at Middlevale Lane and Bonifant Road at Notley Road. Based on input from the community, the scope of the study was expanded to include traffic volumes and a queuing analysis at the intersection of Bonifant Road and Catoctin Drive, which resulted in the revised study of April 29, 2009. The study included an evaluation of local area transportation review

(LATR) impacts, as well as the policy area mobility review (PAMR) for the proposed special exception. 10/23/09 Tr. 144-146.

Traffic counts were made at all the studied intersections and critical lane volumes were calculated for all the intersections under existing conditions. During the morning peak hour, the highest critical lane volume was 1,030, well within the 1,475 congestion standard. In the evening peak hour, the highest critical lane volume was 1,138, once again, well within the congestion standard. The traffic counts are included in the appendix. Traffic counts also included counts of bicyclists and pedestrians, and that information is noted in the report.

The next step in the analysis was to consider other approved developments that are required to be included as part of the study. There were four approved developments that were identified at the time to be included, and they are listed in the traffic impact study – Bonifant Park, a residential development, Plaza del Mercado, which is Giant Food, Mid-County Community Recreation Center and the Indian Spring residential development. Under Montgomery County guidelines, he conducted trip generation analyses for those additional future developments, and assigned that traffic to the surrounding area road systems to come up with the future background condition, which is a future traffic volumes without the proposed daycare center, and once again analyzed those intersections, using critical lane volume capacity procedure. Once again, the congestion or the critical lane volumes are well below the congestion standard of 1,475, with the highest CLV being 1,249, at the intersection of Layhill and Bonifant Road in the evening peak hour.

The next step was to then project traffic for the proposed daycare center. Park and Planning for Montgomery County has trip generation rates for daycare centers, and those rates are based upon the number of employees at the daycare center. The trip generation rates that County Park and Planning provides for daycare centers are listed on page 15 of the traffic study, in what's identified as

Exhibit 8 of the study.¹⁴ The total number of trips that would be expected to be generated by the daycare center were developed using the proposed maximum of 25 employees.

A maximum of 25 employees and 158 students at the facility would be expected to generate a total of 32 vehicles trips into the site in the morning peak hour, and 29 vehicle trips out of the site in that peak hour, for a total of 61. During the even peak hour, pickup time, it would be expected to generate 33 vehicle trips into the site and 35 vehicle trips out of the site, for a total of 68. That exhibit also shows that many trips generated by daycare centers are either pass by trips or diverted trips.¹⁵

The trip generation analysis in Exhibit 8 shows that in the morning peak hour, a total of 17 trips, or nine trips in, eight trips out, would be pass-by trips, people that are pulling off of Bonifant Road. And in the evening peak hour, there were a total of eight pass-by trips, four in, four out, that would come from Bonifant Road. The remainder of the trips were, for purposes of this traffic study, assumed to be new to the road system. The result is a total of 23 new trips in the morning peak hour entering the site, and 21 exiting the site. In the evening peak hour, a total of 29 new trips will enter the site, and 31 exist the site. So in terms of measuring impact on the overall road system, the total is 44 new trips in the morning peak hour, and 60 in the evening peak hour. However, in terms of impact at the planned access to the site and on Catoctin Drive, the total is 61 total trips in the morning, and 68 in the evening [*i.e.*, whether they are new trips or pass-bys, they will still have an impact on Catoctin Drive].

Mr. Cornelius assigned the new trips to the surrounding road system, and then developed the

¹⁴ The reader should note that Mr. Cornelius's references are exhibits within his traffic study (such as "Exhibit 8"), and they are not the same as the Hearing Examiner's numbered exhibits.

¹⁵ Most trips to daycare centers involve motorists who are dropping their children off in route to another purpose, that is, the majority of them in the morning are going from home to work, and in the evening are going from work to home. A true pass-by trip would basically be a trip that's already on the road system, that stops into the center and continues along the trip, and doesn't change the travel pattern. A diverted trip is similar, but it wouldn't necessarily come right off the adjacent roadway. It would come from another roadway in the area.

total future traffic volumes at the studied intersections, using the critical lane volume methodology. The results are contained on Exhibit 11 of page 19 of the traffic study, showing that all the intersections are still well within the congestion standard with the peak, highest CLV occurring at the intersection of Layhill Road and Bonifant Road in the evening peak hour of 1,271. He thus concluded that, with regard to local area transportation review, the surrounding road system is capable of accommodating this development and the daycare center would not cause any of those intersections to exceed the standards of the County.

The report also identifies the required trip mitigation that is part of the policy area mobility review. Once again, at the time the study was done, the mitigation requirement for Aspen Hill was 40 percent. As of today, that requirement is 20 percent.

There is also a question in terms of how many trips would have to be mitigated for PAMR, in terms of whether Petitioner has to mitigate only new trips, or has to mitigate both new and diverted trips. Pass-by trips do not have to be mitigated. He assumed that diverted trips are still within the policy area, and therefore Petitioner planned to mitigate only new trips, at a 40% rate. Technical Staff used the new 20 percent mitigation requirement, but applied it to both the new and diverted trips, concluding that Petitioner should mitigate 12 trips. That is something that will be worked out at the subdivision stage in order to get approval from both the County, DPWT as well as Park and Planning in terms of how many trips actually have to be mitigated.

Petitioner has suggested that a good way to mitigate those trips and satisfy PAMR is the construction of sidewalks in the area. There are sidewalks on both sides of Bonifant Road, but there are no sidewalks along Catoctin Drive. As part of the development of this site, sidewalks would have to be installed along the frontage, but in addition to that, sidewalks could be provided on the other side of Catoctin Drive, which would provide a place for pedestrians to walk. Catoctin Drive is a secondary residential street. It is approximately 25 feet wide and has a 60-foot wide right-of-way.

Mr. Cornelius further testified that subsequent to review of his traffic study by Park and Planning staff, comments and questions were received from the community. Therefore, Park and Planning staff asked him to go out and conduct queuing counts along Bonifant Road, extending back from the signal at Layhill Road, and on Catoctin Drive, at the approach to Bonifant Drive. Those queuing counts were conducted by his office on Tuesday, April 16, 2009.

A queuing count, typically, is done by someone out in the field identifying either distance or number of vehicles from an ending point, such as a signalized intersection, or a stop controlled intersection. In case of a signal, every time the light turns green for that phase of the signal, the observer would identify what the queue is. For stop controlled intersections, the observer sets a time period. Every time there are vehicles queued there, it is recorded.

The queuing counts showed queues similar to what he had observed during field visits. On Bonifant Road, due to the 250 foot distance from Layhill Road to Catoctin Drive, during peak times, queues extend from Layhill beyond the intersection with Catoctin Drive. However, during the queuing study, which was 6:30 to 9:30 in the morning, and 4:00 p.m. to 7:00 p.m. in the evening, most times the queue did not extend to Catoctin or beyond Catoctin. For approximately 20 percent of the one minute intervals, in the morning, the period from 6:30 to 9:30 a.m., and 17 percent in the evening from 4:00 to 7:00 p.m., there were queues that extended along Bonifant back to Catoctin Drive. During those times when queues did extend beyond Catoctin, most times they typically disappeared as soon as the signal changed, and then the queue was gone. They therefore didn't cause any significant backups or delays on Catoctin Drive.

The second part of the study recorded the actual queues on Catoctin Drive, and the queuing analysis showed, in the morning peak hour, a maximum of five vehicles were queued on Catoctin Drive at any one time, and the specific data shows that a minute later, that queue was gone. That occurred two times, and a queue of four vehicles occurred two times during that three-hour period in

the morning from 6:30 to 9:30. All the rest of the times there were two vehicles or less that were queued on Catoctin Drive.

In the evening peak period from 4:00 to 7:00 p.m., the queuing analysis showed a maximum of two vehicles queued on Catoctin Drive, and most times there were no vehicles. So the queuing analysis showed that there is some queuing on Catoctin, but it is short lived, quickly clears, typically when the signal changes at Layhill and Bonifant Road, and that motorists do not have excessive delays accessing Bonifant Road.

Subsequent to the Planning Board hearing, there was a concern raised by one of the citizens that Mr. Cornelius only did one day of queuing counts on Catoctin Drive. So, his office did two additional days of queuing counts, and those summaries were provided to the record. Once again, they were done in the morning hour, 6:30 to 9:30 a.m., and in the evening, 4:00 to 7:00 p.m. They were conducted on Tuesday, October 20, and Wednesday, October 21, 2009. Everything was summarized in 15-minute increments, with a total summary at the end of each report.

This additional queuing data is very similar to what he found in the original queuing study. There was a maximum queue of four vehicles in the morning peak hour on Tuesday, October 20, 2009, and an average queue for that time period of less than one vehicle. There were similar results in the evening peak hour, a maximum queue of two. On Wednesday, October 21, 2009, a maximum queue of five vehicles was observed in the morning peak hour, with an average queue of less than one vehicle, and in the evening peak hour, similar results, a maximum queue of two, and an average queue less than one vehicle. Thus, the queuing data was very similar to the queuing data that was included in the April 29, 2009, traffic report. The overall volumes contained in the original traffic study, in terms of number of motorists who were exiting Catoctin Drive from 6:30 to 9:30 in the morning, and from 4:00 to 7:00 in the p.m., were consistent with the total vehicles that were observed on October 20th and October 21st. The volumes were very similar all three days.

The data from the queuing observations is contained in Exhibit 147, his November 25, 2009, letter to Shahriar Etemadi of Technical Staff regarding supplemental data and analysis. That exhibit [Exhibit 147(a)] also contains a letter of September 24, 2009, from Mr. Cornelius to Mr. Hutt regarding bus safety.

Mr. Cornelius further noted that in the October 2009 follow-up study, his office also recorded times on an “automated traffic count board,” so delays were recorded, as well as queues. So delays were measured for every motorist who exited Catoctin Drive onto Bonifant Road. Those delays are also summarized by 15 minutes and for the full three hour increments in the morning and the evening peak hours.

During the October 20th, 2009, morning peak time frame, the maximum stop time for a motorist was 74 seconds. That is the longest it took someone to pull out onto Bonifant Road. The average delay for those motorists was just over 16 seconds. It shows that if a driver pulls up right when the queue on Bonifant Road happens to be extending beyond Catoctin Drive, he may have to wait for the signal to change, and he may have a minute wait or possibly a little bit more. But on average, typically the queue is not up to the intersection, and those motorists do not have a difficult time getting out with an average delay of 16 seconds for all motorists on Catoctin Drive trying to get out onto Bonifant Road in the peak period of the morning.

In response to the Hearing Examiner’s question as to how he would anticipate this delay and queuing data would change if the special exception is approved, Mr. Cornelius testified that there's no way to calculate exactly what the incremental change will be, but based on the January 6, 2010, letter from Mr. Etemadi of Technical Staff (Exhibit 166), he stated, “it's not expected that the additional traffic [projected to be exiting the childcare facility], these 29 motorists exiting in a peak one-hour period, would add significantly to either the [queuing]¹⁶ or the overall delay for the Catoctin Drive

¹⁶ The court reporter spelled this word as “cuing,” which sounds like the word the witness was actually using, “queuing.”

approach to Bonifant Road.” 1/15/10 Tr. 52. This is because the queuing and delay study shows that 75 to 80 percent of the time, there are no vehicles on Catoctin Drive, trying to get onto Bonifant Road. Chances are that these motorists would come up to the intersection at Bonifant without any other vehicles there. Thus, probably 50 percent of those people may proceed when there's no traffic there, and will thus not add to the delay to the existing motorists if there is nobody there. The other 50 percent, approximately 15 vehicles, may add to an existing queue, but it will be spread over the course of an hour since in a daycare facility, unlike a school, arrivals are more staggered, with arrivals and departures spread out over a two to three-hour period.

Mr. Cornelius further testified about the concern raised by the community about the safety of school bus activity and children in the area going to and from a school bus, and the interaction with the proposed childcare facility. 1/15/10 Tr. 53-61. Those concerns are what triggered his September 24th, 2009, letter contained in Exhibit 147(a). Using Exhibit 132, Mr. Cornelius noted the locations of the elementary school bus stop on Catoctin Drive, and the middle school and high school bus stops on Bonifant Road. The buses for the middle school and high school do not turn onto Catoctin Drive. So it's only the one elementary school bus that comes down Catoctin, and the drop-off and pickup location is about 150 feet south of the intersection of Catoctin Terrace and Catoctin Drive. It is also approximately 150 feet south of the egress for the subject site.

Mr. Cornelius further testified that when the middle school and the high school buses stop, their lights are flashing, and no one can turn in or out of Catoctin Drive if they are stopped right at the intersection and their red lights are flashing.

The elementary school bus turns down Catoctin Drive, comes all the way down, makes a left turn onto Catoctin Court, backs up into the T-turn around, which is a dead end area, and then pulls up, once again, and children load from that location. While that bus is stopped, and children are loading, traffic can clearly come into and exit a childcare facility, just like traffic can enter and exit Catoctin

Terrace. Thus, the childcare center will have no interaction with children getting on or off the school bus, and there is no safety concern with people coming into and out of the childcare facility at the time the elementary bus is dropping off or picking up children.

Mr. Cornelius further testified that the proposed one-way on-site circulation pattern will “achieve maximum safety, for both pedestrians and motorists.” 1/15/10 Tr. 62. He also opined that Catoctin Drive “is certainly wide enough to accommodate safely two-way traffic. Traffic volumes are very low. With the additional daycare center, that will not change. Traffic volumes will still be volumes that are typical of residential roadways.” 1/15/10 Tr. 62. In his opinion, the proposed use will be in harmony with the general character of the neighborhood and would meet the other Code standards, as regards to traffic. There are no residences that access Catoctin Drive between Bonifant Road and Catoctin Terrace, which is directly across from the southernmost driveway of the subject site. Mr. Cornelius also opined that adequate public facilities are available to support this proposed child daycare center from a public road standpoint and that it would not adversely impact safety.

Mr. Cornelius stated that the plan is that the drivers would actually park their vehicles and go in to drop-off or pickup their children. The parking as included on the site plan meets County requirements, and is consistent with parking needs that he has personally been involved with at other daycare facilities, and is consistent with typical requirements for parking for these types of uses. He further testified that the proposed use would satisfy section 59-G-2.13.1(a)(5), as to the transportation and traffic aspect; that the use is compatible with the surrounding uses; and that it will not result in a nuisance because of traffic, parking, noise, or type of physical activity.

When asked on cross-examination whether the proposed use would add to the danger of children waiting in the street near the school bus stop on Bonifant at its intersection with Catoctin, Mr. Cornelius responded that there are thousands of vehicles an hour on Bonifant Road, and the use would add some additional traffic on Bonifant, but it would be a very minimal increase. It would not

change the overall volume character of Bonifant Road. On Catoctin Drive, there is very low volume there today, and when you add the childcare facility, it will still be a very low volume. It's still safe for pedestrians, and in fact, the childcare facility is going to construct a sidewalk along its frontage which will make it safer for pedestrians. Anytime you add one more vehicle, one could say there is increased risk, but looking at the overall safety of the road system, in his opinion, just adding vehicles doesn't necessarily adversely impact the safety. He looked at accident data for the intersection of Bonifant Road and Catoctin Drive, as well as along Catoctin Drive, and there have been no reported accidents along Catoctin Drive involving pedestrians or motorists for the three-year period. From 2005 to 2007 there was an average of one accident per year at the intersection of Catoctin Drive and Bonifant Road, which is not a significant accident experience. Therefore, given the existing safe conditions, and based upon the data concerning accidents, it is his opinion that the additional traffic will not change those aspects. 1/15/10 Tr. 80-83.

Mr. Cornelius testified that revisions to the plans which reduced the number of full time-equivalent employees from 25 to 23 and the number of children from 158 to 138 would reduce the number of a.m. peak hour trips from 61 to 57 and evening peak-hour trips from 68 to 63. CLVs may remain the same or go down slightly. His previous conclusions would be unchanged. 4/9/10 Tr. 33-38.

Mr. Cornelius testified on rebuttal (4/9/10 Tr. 66-152) that the testimony of Ms. Walden and the data from Mr. Thomason regarding delays at Catoctin Drive were actually consistent with Mr. Cornelius's own findings, and they demonstrate that the current delays are not inordinate for an unsignalized intersection. They amount to an average delay in the morning peak hour of 15 seconds for vehicles turning left onto Bonifant and 8 seconds for right-turning vehicles, for an average delay of all vehicles exiting of about 13 seconds (since 75% of the turns were left turns). The average delay in the evening peak hour was 36 seconds for vehicles turning left onto Bonifant and 16 seconds for

right-turning vehicles, for an average delay of all vehicles exiting of about 30 seconds (since 75% of the turns were left turns). 4/9/10 Tr. 66-71.

Mr. Cornelius noted that, for 75 to 80 percent of the traffic exiting on Catoctin Drive in the peak periods, there were no vehicles sitting there waiting. Thus, most of the traffic that would be generated by the daycare center is likely going to arrive at that road when there is no other traffic from the community coming out. Approximately 25 percent of the new trips will exit the community at the same time as residents. There will be some additional queuing at certain times, but it's not going to be significant because most of the time there is no traffic there. 4/9/10 Tr. 72-73.

Mr. Cornelius also observed that the opposition's reference to the AAA's characterization of the Layhill/Bonifant Road intersection as being very dangerous was based on 1997 data, and it appears from a newspaper article (Exhibit 209(t)) that the state highway administration did not agree with it. He also cited to a 2004 study done by the federal Department of Transportation and Maryland's State Highway Administration, of the impacts on traffic of the ICC (Exhibit 209(x)). It projected that the ICC would result in a reduction of volumes at the intersection of Layhill Road and Bonifant of about 17% in the morning peak hour and 22 percent in the evening peak hour in 2010. Moreover, similar numbers are reflected in long term projections for 2030. 4/9/10 Tr. 80-89.

Mr. Cornelius also responded to the opposition's argument that Catoctin is narrow, saying it's actually a typical residential street at 26 feet wide and that children at the elementary school bus stop would not be endangered because traffic from the daycare will not pass them. Regarding the middle and high school bus stops on Bonifant at Catoctin, Petitioner will be adding a sidewalk on the west side of Catoctin and possible on the east side as part of its PAMR mitigation, which will improve safety. 4/9/10 Tr. 91-97.

Mr. Cornelius further testified that with the reduction in staff to 23 and children to 138, the number of required parking spaces has been reduced to 46. Petitioner will provide 52, which is 6

above what County regulations require. When there is overflow because of special events, Petitioner has committed in its TMP to providing offsite parking and shuttling people. 4/9/10 Tr. 100-102.

Mr. Cornelius indicated that he used County LATR standards for projecting trips rather than the ITE because that is what the County requires; however, even if ITE rates were applied and the number of trips doubled, the intersections involved would still be below the CLV threshold, and the impact on delays would be minimal since 75% of the time there is presently no queue at the Catoctin/Bonifant intersection. 4/9/10 Tr. 110-119.

5. James W. Hendricks (1/15/10 Tr. 185-211):

James W. Hendricks testified as an expert in a civil engineering. Mr. Hendricks prepared the stormwater management concept plan (SWMCP) and the parking facility plan.

To address the quality of storm water on this project, there will be two underground sand filters, which will receive water draining off of the parking lots. Ground water recharge will be handled by the use of dry wells in the playground area. They are underground. Water will get piped from the rooftop to an underground trench filled with stone. The water gradually gets back into the ground water table. Because the one-year storm generated less than two cubic feet per second of runoff, water quantity control was not required. Mr. Hendricks testified that the SWMCP was approved by DPS, and he produced a December 11, 2008, letter so indicating (Exhibit 174). The SWMCP currently meets County standards; however, it may be affected by new state regulations at subdivision. 1/15/10 Tr. 190-195.

Mr. Hendricks described the parking lot as having 52 perpendicular parking spaces, including spaces for the handicapped. The facility will have a one-way drive isle, and there is an exit that's also 24-feet wide onto Catoctin Drive. The road is posted at 30 miles per hour, so a sight distance of 200 feet in each direction is required. Mr. Hendricks measured and determined that there are adequate sight distances for both the entrance and the exit. 1/15/10 Tr. 196-197.

A parking waiver was requested to allow five of the spaces on the southern edge, instead of being eight and a half feet wide, to be seven and a half feet wide, to avoid encroaching into the area that is being reserved for forest conservation. 1/15/10 Tr. 197. Mr. Hendricks testified that the parking facility meets all the other requirements, including the number of spaces, shading and safe circulation; the only question being the width of five of the spaces. In his opinion, the facility will still meet the objectives of Zoning Ordinance §59-E-4.2. 1/15/10 Tr. 202-204.

Mr. Hendricks further testified that the proposed use will be served by adequate public services and facilities, including water, sanitary sewer, storm drainage, and that this project would not put an undue burden on those facilities. The water and sewer categories and W1 and S1. The sewer will be connected to an existing sewer in Bonifant Road, and a water connection will be made to the existing water line in Catoctin Drive. There is a gas line available in Bonifant Road, and there is power available to the site, also electricity and telephone. 1/15/10 Tr. 205-206.

6. Milena Mattingly (4/9/10 Tr. 57-64):

Milena Mattingly testified that her firm, AMG, LLC, will be the operator of the daycare facility. The playground will operate only between 8:30 a.m. and 5:30 p.m. the only event during which it will be used after hours will be the grand opening. Children for after-school care will arrive by school bus; none would walk. Maintenance will be done between 9 and 5. There will be no outdoor amplified sound. [Although the witness referred to using “best efforts” to keep maintenance within specified hours, Petitioner’s counsel agreed to remove the “best efforts” language from the Statement of Operations, and make an affirmative commitment.] 4/9/10 Tr. 57-64.

B. Community Participants

1. Lorena Ramirez (10/23/09 Tr. 44- 69):

Lorena Ramirez testified that she lives on Catoctin Terrace, and that her concern is for the safety of her children who are picked up at the school bus stop at Catoctin Court and Bonifant Road.

There are no sidewalks on Catoctin Court. She feels there are already both traffic volume and safety issues. “[I]n that particular area where vehicles from the facility are going to be coming in and out, it's already a problem as it is.” 10/23/09 Tr. 51. Traffic is blocked when the school busses arrive.

2. Janice Walden, individually and on behalf of the Beacon Place HOA (1/15/10 Tr. 213-240; 1/22/10 Tr. 90- 111, 181- 196, 202-220; 4/9/10 Tr. 191-199; 5/21/10 Tr. 111-117):

Janice Walden and Peter Zara testified on behalf of the Beacon Place Homeowners Association (BPHOA). Ms. Walden stated that BPHOA objects to the proposed daycare center. Using map Exhibits 131 and 175, Ms. Walden described the location of her neighborhood. She stated (1/15/10 Tr. 216):

Dayhill, LLC's proposal for the daycare center places the two sole access points, one entrance and one exit, to the facility on Catoctin Drive. The road's purpose for the past 20 plus years has been to serve as an entrance and exit to our residential community. A door-to-door poll of our community residents currently shows that an overwhelming majority oppose the project, as stated in the current proposal. The main objections are the excessive increase in traffic flow in our neighborhood, and the size of the proposed project in terms of the number of children, and the building footprint as compared to our homes.

In Ms. Walden's opinion, this project is not in harmony with the general character of her well-established neighborhood, and that the impacts of this project, both separately, as large individual flaws, or jointly, as analyzed in a cumulative manner, have not been sufficiently addressed to make this project acceptable to the zoning ordinance standards (*i.e.*, 59-G-1.21 and 59-G-1.23 subparagraph (c)). She noted that Catoctin Drive is the one and only road that leads in and out of their cul-de-sac community. The inherent characteristics of the neighborhood are such that the traffic study criteria do not capture the real traffic patterns and impact of this proposed project on the community.

Additionally, the traffic study does not cover all of the non-inherent issues, which are greater than is written in the special exception that's been submitted. The problem she finds with the traffic study recognized by the Montgomery County Planning Board on October 8th, 2009, is that the majority of cars exiting Catoctin Drive already make a very difficult and dangerous left hand turn

onto Bonifant Road. Due to the proximity of Bonifant and Catoctin Drive intersection located so close to Bonifant and Layhill Roads, there is a steady flow of traffic on Bonifant Road from both directions, at the entrance and exit point on Catoctin Drive. Bonifant Road has five lanes of traffic, two going east, two going west, and a third lane going west is a left hand turn lane onto Layhill Road.

Ms. Walden indicated that the two lanes approaching Catoctin Drive converge into one lane just past Catoctin Drive. Some people make a right hand turn, and they go as far as they have to, and then they make a U-turn in the middle of the road for safety purposes. They feel safer doing it that way than waiting for all the other traffic, the five lanes of traffic, to make a left. So there is considerable congestion and juggling of vehicles trying to merge left as they approach Catoctin Drive. This occurs during peak traffic hours especially. It's especially difficult, and it creates a backup, which, she stated, the traffic people like to call queuing.

Ms. Walden also mentioned that the Inter-County Connector (*i.e.*, the ICC) is going to exit less than a half mile north on Layhill Road from this area, which she believes will further aggravate the traffic situation.

Ms. Walden argued that the proposed use would create non-inherent adverse effects due to the sole entrance to the neighborhood on Catoctin. Also, traffic from the other neighborhood and from the shopping center directly across from Beacon Place neighborhood, and from the Sandy Spring Bank and residences east on Bonifant make it exceptionally difficult, during peak hours, to encounter a break in the traffic. It usually results in a waiting time to make left hand turns and they are always risky. 1/15/10 Tr. 230-231. Given the current waiting time, she felt that it would not take much increase to for the situation to get out of hand. Ms. Walden stated (1-15-10 Tr. 231):

My experience has been that I sit probably on average 30 seconds to get out. . . .
There are many times that I could say I can sit there a minute, over a minute in time.

When asked "when would you say you average 30 seconds? What time of day would you say that's measured?," Ms. Walden answered (1-15-10 Tr. 231),

More around those peak hours we're all talking about in the morning and in the evening. When I go out in the middle of the day, it's pretty much, you know, a snap.

Ms Walden further testified that Petitioner's own traffic impact study indicates that the current traffic conditions require very dangerous maneuvers by BPHOA residents and users of Catoctin Drive access point. They believe it will greatly be exacerbated by the additional traffic generated by patrons of a daycare center with 25 staff and the potential for 158 children.

According to Ms. Walden, the CLV ratio is currently 0.85, which is very close to the critical ratio of 1 for congested roads. She feels that the traffic will only be increasing in the near future with the inter-county connector access less than a half mile north on Layhill, and the additional commercial development that will naturally be associated with having an exit for an inter-county connector in the neighborhood. This was never considered in the traffic analysis.

Ms. Walden argued that the proposed daycare center contradicts the Master Plan. The Plan states on pages 80 and 81 that future special exceptions should, "avoid excessive concentrations of special exceptions and other nonresidential land uses along major transportation corridors. Sites along these corridors are more vulnerable to over-concentrations because they are more visible. It is important in this area to minimize uses that might diminish the safety and reduce the capacity of the roadway by creating too many access points, and conflicting turning movements." 1-15-10 Tr. 234.

Ms. Walden also noted that photos in the Technical Staff report depict other childcare centers, but they are in more commercial areas with much better access.

Ms. Walden also observed that Planning Board Commissioner Presley had found that absent a resolution of the traffic issues, they were a non-inherent effect. 1/22/10 Tr. 91-92. Ms. Walden feels that design of the parking lot will lead to traffic safety concerns, and she reviewed her other safety concerns, such as the school bus stop issues. She also believes the new use will double or triple traffic in their neighborhood, and that the amount of parking provided will be insufficient.

1/22/10 Tr. 98-102. Parking is not restricted on Catoctin Drive, and Ms. Walden fears an overflow into the neighborhood. Since it is such a narrow roadway, she believes that ingress and egress is going to greatly be impacted by a daycare center enrolling 158 students. A roadway is directly opposite the proposed daycare center where it will be located, and in all likelihood, the patrons may attempt to park at the curb, which would create a very dangerous and difficult traffic pattern for circulating cars. 1/22/10 Tr. 102-106. Ms. Walden added (1/22/10 Tr. 108-109):

[T]he additional cars, obviously created by this daycare center, is going to make a major shift in our lifestyle. The rather safe, traffic free environment we now experience and have gotten used to, will go to one of a high traffic volume and high traffic corridor, changing the tenor of Catoctin Drive from that of a quiet neighborhood exit, you know, pulling out, or sign is there designating we're Beacon Place, to wow, look at this big huge building in this area. This is not residential. This is a commercial site.

It's going to take the road from being a residential ingress and egress into what we believe is going to be, without a doubt, someone pulling in to come and see me thinking, you know, this is not the quiet neighborhood I thought Jan lived in. We want to point out the additional noise that's going to come from cars coming and going in and out of the daycare center, especially to those . . . closest homes.

Ms. Walden also suggested that a stop sign is needed at the exit from the daycare center, if it is approved, and further discussed the proposed TMP and community liaison council (CLC). 1/22/10 Tr. 181-190. [Ms. Walden reviewed the community's argument regarding compatibility and the residential nature of the road. Since it is contained in Parts 5 and 6 of BPHOA's written submission (Exhibits 188 and 189) , it will not be repeated here.] 1/22/10 Tr. 191-196.

Ms. Walden argued that the proposed use is incompatible with her neighborhood and not what was envisioned by the Master Plan recommendation. Relying on Kiddie Academy's website, she urged that the proposed use is more like a private educational institution (PEI) than a daycare center and should have been filed under that category. The building is large for the area and the number of students per acre is close to the maximum permitted for a PEI. She also noted that the proposed monument sign is very large for a residential neighborhood, and that the proposed lighting would

create adverse effects. 1/22/10 Tr. 202-220.

On the final day of the hearing Ms. Walden participated in the closing arguments 5/21/10 Tr. 111-117. [Since BPHOA's closing argument is detailed in Part 12 of BPHOA's written testimony, it will not be repeated here.]

3. Peter Zara, individually and on behalf of the Beacon Place HOA (1/15/10 Tr. 213-240; 1/22/10 Tr. 57-90, 111-181, 197-202, 221-257; 4/9/10 Tr. 191-226; 5/21/10 Tr. 22-61; 82-111):

Mr. Zara testified that the Master Plan does recommend a daycare center, but it doesn't mention the kind of daycare center, and the Master Plan dates back to 1994. It's a fairly old document, and daycare centers were relatively smaller in those days. They weren't the school-type buildings that we get today. In the Park and Planning report, Mrs. Tesfaye specifically states that it was probably not intended to have a daycare center of that size on that plot. 1/15/10 Tr. 227.

Mr. Zara, in addition to testifying as a resident in the neighborhood and a representative of BPHOA, testified as an expert in "environmental and social assessment," which he, more or less, described as assessing the impacts of developments on communities.¹⁷ 1/22/10 Tr. 59-67.

Mr. Zara focused on the non-inherent effects. His community considers the left turn out of their residential area to be a non-inherent effect. He admits that the traffic volumes are relatively low because its only 108 townhouses. Therefore, the increase in traffic is relatively substantial, and it will change the character of the neighborhood. There are two non-inherent effects. The first one is that left hand turn out of Catoctin is particularly dangerous. The second non-inherent effect related to traffic is the fact that there is only one entrance and one exit. That's a compatibility issue. These two non-inherent effects are very difficult to mitigate. 1/22/10 Tr. 70-71.

Mr. Zara noted that applicant's traffic study mentions that people have to "sneak out" of the

¹⁷ This field is not typically an area of expertise which relates to cases before this body; however, Mr. Zara's resume (Exhibit 181) establishes his expertise in his field internationally, and the Hearing Examiner will determine the weight to be given such testimony based on how probative it is regarding the issues of this case.

neighborhood and that some people make a right and then U-turn back around. That's a risky situation as well. Another point is that the intersection of Bonifant and Layhill was considered one of the most dangerous in the Washington, D.C. greater metropolitan area according to AAA's latest report dated 1999-2000.

As to the ICC, Mr. Zara argued that when you bring in more roads, you actually create more development. It might relieve congestion for a little while, but he believes that eventually there will be more congestion. In any event, he felt that Petitioner's case was deficient for not addressing the impact of the ICC.

Mr. Zara noted that there are many "strange" traffic patterns in the area, and many near accidents go unreported. He also does not agree with the assumption made by Technical Staff and Mr. Cornelius that only a small portion of the potential clients will come from the east because there are many residential areas to the east. Thus, there will be more people making a left into Catoctin and more delays.

Mr. Zara also emphasized that the cumulative impact of the effects should be addressed, even if individually they do not push this case over the threshold.

Mr. Zara indicated that parking is restricted on the west of Catoctin Drive and south of Catoctin Terrace, but it is not restricted on most of the east side of Catoctin, except for that little space, north of Catoctin Terrace. Given that it's not possible to impose a condition on public parking, BPHOA feels that the parking situation on the eastern side of Catoctin Drive going down and going around on the northern side of Catoctin Terrace, rises to the level of a non-inherent effect, because on the eastern side of Catoctin Drive, it will represent a health and safety issue in the sense that daycare patrons might try and park along here to drop off their children, since the daycare center is immediately adjacent. This will restrict the size of the lane, and will cause huge traffic problems along Catoctin Drive. 1/22/10 Tr. 114-116.

Mr. Zara also argued that the number of special events proposed for this facility (52), even though much reduced from earlier proposals, was inordinately large and constituted a non-inherent effect because of parking demands. He would consider six (*i.e.*, one every two months) to be a reasonable number. 1/22/10 Tr. 117-119.

Mr. Zara reviewed his objections to traffic analysis done by Petitioner and Technical Staff, and he critiqued the proposed traffic management plan (TMP). [His points are detailed in Parts 4 and 5 of BPHOA's written testimony (Exhibits 186 and 187), and therefore will not be repeated here.] 1/22/10 Tr. 122-181.

Mr. Zara argued, based on a letter back from when Catoctin Drive was planned more than 30 years ago (Exhibit 189) that the origin and purpose of Catoctin Drive was residential, not commercial. 1/22/10 Tr. 197-202.

Mr. Zara further argued his points about the Master Plan and compatibility, and reviewed BPHOA's written testimony regarding cumulative effects of the proposed use (Exhibit 190), environmental concerns (Exhibit 191), issues during construction (Exhibit 192), perceived deficiencies in the Statement of Operations (Exhibit 193), and efforts to communicate with the Sandy Spring Bank regarding the possibility of an entrance to the subject site on Layhill Road (Exhibit 194). 1/22/10 Tr. 221-257. [Since these points are detailed in Parts 7 through 11 of BPHOA's written testimony, they will not be repeated here.]

On the final day of the hearing, Mr. Zara introduced additional exhibits bearing on issues previously discussed in the case (Exhibits 225 through 228). 5/21/10 Tr. 22-61. He also introduced Part 12 of BPHOA's written testimony, which contained a summary of their positions and their closing argument (Exhibits 230(a) and (b)). 5/21/10 Tr. 82-111. [Since BPHOA's closing argument is detailed in Part 12 of BPHOA's written testimony, it will not be repeated here.]

4. Dallas Thomason (1/22/10 Tr. 6-42):

Dallas Thomason testified that he lives at 84 Catoctin Court, in Silver Spring (*i.e.*, in the subject neighborhood). He has been in this neighborhood more than 10 years. Mr. Thomason presented a 40 minute video of the Beacon Place neighborhood, the intersection of Layhill Road and Bonifant Road and of cars exiting from Catoctin Drive onto Bonifant. He also interviewed a couple of neighbors on the video.¹⁸ He noted that there is no second way to get out of the neighborhood; there is only one entrance and one exit.

He felt that if there are 100 or so extra cars coming into the neighborhood every morning and every afternoon, it's likely that those folks are going to get impatient waiting at the corner to get out, and they are going to head off in other directions to see what they can find. And what they are going to find is the turn around at the end of Catoctin, which is basically a dead end, and they're going to have to come back up this way and get back in line.

At one point in the video, Mr. Thomason recorded cars turning left onto Bonifant from Catoctin at 4:15 p.m. on a Wednesday afternoon (*i.e.*, during the peak period). 1/22/10 Tr. 15-17. The delays seemed to range from about 30 seconds to about 60 seconds. At another point, Mr. Thomason recorded turns from the same location, but during the morning peak period on a Wednesday. Those delays seemed to range from about 17 seconds to 45 seconds. 1/22/10 Tr. 26-28. Mr. Thomason also took measurements on other days, which he recorded in Exhibit 179. He reported that the average a.m. peak hour delay in making the left turn onto Bonifant from Catoctin was 19.78 seconds, and the average p.m. peak hour delay in making the same turn was 39.45 seconds. 1/22/10 Tr. 31-33.

Mr. Thomason feels that the ICC will increase traffic along Bonifant and Layhill, rather than decrease traffic because there is an entrance/exit planned at that location, that's going to be bringing people

¹⁸ Given the hearsay nature of the statements by the interviewees and the cumulative nature of their testimony, the Hearing Examiner will not consider their hearsay statements in evaluating this case.

off the ICC onto Layhill south to his neighborhood intersection. “It is going to bring people from the Frederick area or from upper Montgomery County into our neighborhood.” 1/22/10 Tr. 34-35.

Mr. Thomason testified that the proposed daycare center would be within 10% as large as the Giant supermarket in the neighborhood. 1/22/10 Tr. 38.

5. Dolores Ustrell (1/22/10 Tr. 43-56):

Dolores Ustrell testified that she lives at 89 Catoctin Court, in the Battery Place neighborhood. She is opposed to the proposed childcare center because with 158 children, there will be a lot of people going in and out, which means the neighborhood would be completely changed. She is concerned about the safety of her child with “strangers” walking the neighborhood. She also feels the building would be “huge” and out of place, and the signage would be too large. Ms. Ustrell believes this project is very large compared to other childcare centers (as evidenced by a list she compiled in Exhibit 180 of recent childcare center approvals), and beyond what the Master Plan contemplated, when written.

C. People’s Counsel

Martin Klauber, the People’s Counsel, did not call any witnesses, but he did participate in the hearing and ultimately stated his opposition to the petition, on legal and factual grounds, arguing that this petition should have been filed for a private educational institution, not a child care facility, and that due to the traffic it would create on Catoctin Drive, it has not been shown to be compatible. 5/21/10 Tr. 77-79.

Mr. Klauber also highlighted the central factual issue in this case – whether traffic generated by the proposed use would create compatibility problems for the community utilizing the same access road, Catoctin Drive. 10/23/09 Tr. 34. He advocated for both a transportation management plan and a community liaison council, if the Board does grant the special exception. 10/23/09 Tr. 34-35 and 5/21/10 Tr. 79-81.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. The Threshold Issue – Child Care Facility or Private Educational Institution

Before this case can be evaluated, we must resolve the threshold legal issue – whether the requested use should be characterized as a daycare facility, which is what is petitioned, or a private educational institution (PEI), as permitted under Zoning Ordinance §59- G-2.19, or both. It is a threshold question because the two types of special exception do not have precisely the same requirements.

The issue raised was initially by Janice Walden of BPHOA in cross-examination of Chris Commarota of Kiddie Academy. 10/23/09 Tr. 194-200. It was highlighted again by the former People’s Counsel, Martin Klauber at the next hearing date (11/20/09 Tr. 20-21), and the Hearing Examiner gave the parties an opportunity to brief the issue, which they did. Exhibits 152, 154 and 157. The parties argued the issue at the beginning of the hearing on January 15, 2010 (1/15/10 Tr. 5-42) and renewed the argument later in the hearing. 5/21/10 Tr. 85-86.

Mr. Klauber and BPHOA argue that Petitioner should be required to file its petition for a PEI or both a PEI and a childcare facility because of the extensive indicia on the Kiddie Academy website

that its orientation is more properly characterized as education than child care (or possibly a hybrid of the two). Exhibits 152 and 154. As stated in BPHOA's letter of December 14, 2009 (Exhibit 152, p. 2),

We have done an exhaustive review of the Kiddie Academy website and find on almost every page references to "education-based child care." Based on this review, we believe that the average reader (e.g., parent, guardian) contemplating placing a child in the care of Kiddie Academy would expect their child to receive an early childhood education. Their home page reads "Welcome to Kiddie Academy—a leader in child care education for more than 28 years." . . .

Attached to BPHOA's letter was a five page list of references to educational goals and curriculum from Kiddie Academy's website. Exhibit 152. The submission from the former People's Counsel (Exhibit 154) proceeds along the same vein, although the People's Counsel concedes that the staggered arrival of children more resembles a daycare.

Petitioner argues in response that the very attributes the People's Counsel and BPHOA identify as educational are also attributes recognized by the State of Maryland as part of childcare obligations. Exhibit 157. The State's regulations governing "Child Care Centers" are contained in Subtitle 16 of Title 13A of the Code of Maryland Regulations (COMAR), which Title is entitled "State Board of Education." Petitioner quotes from COMAR as follows to support its point (Exhibit 157, p. 7-9):

(1) COMAR 13A. 16.09 entitled "Program Requirements".

1. Subsection 13A.16.09.01 entitled "Schedule of Daily Activities for All Children" provides as follows:

A. The operator shall prepare, post, and follow a written schedule of daily activities that:

- (1) Promote the sound emotional, social, intellectual, and physical growth of each child;
- (2) Are Appropriate to the age, needs, and capabilities of the individual child;
- (3) Include opportunities for individual and group participation;
- (4) Include a balance between self-selected and staff-directed activities;
- (5) Include a balance between active and quiet periods;

(6) Include periods of rest appropriate to the age, needs, and activities of the child; and

(7) Include outdoor play in the morning and afternoon except that outdoor play need not be included;

(a) When the weather is inclement; or

(b) In a before-school program.

B. A before-school and after-school program schedule of activities shall take into consideration that the child has attended an instructional program during regular school hours. (Emphasis Added)

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(2) COMAR 13A.16.09.03, entitled “Activity Materials, Equipment, and Furnishings.”

A. For indoor and outdoor activities, an operator shall provide each group of children in care sufficient quantity and variety of activity materials, equipment, and furnishings according to the numbers, age, and development needs of the children.

B. Activity materials and equipment shall be:

(1) Provided for:

(a) Vigorous play;

(b) Creative and dramatic play;

(c) Socialization;

(d) Manipulation, including construction materials;

(e) Exploration of art, music, language arts, and science;

(f) Individual pursuits;

(2) Appropriate for each child’s individual development of cognitive, social, emotional, and fine and gross motor skills;

(3)

(4)

C. In reviewing materials and equipment in before-school and after-school programs, the office shall take into consideration that the child has attended an instructional program during regular school hours.

D.

E. (Emphasis Added)

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(3) COMAR 13A.16.08 entitled “Child Supervision”

(1) Subsection 13A.16.08.02 entitled “Supervision by Qualified Staff.

A. At all times while in care, the child shall be assigned to a group of children that is supervised by a child care teacher who meets the requirements of COMAR 13A. 16.06.09 or .10, depending on the age and composition of the group.

B. The operator shall assign qualified child care teachers to each group of children as needed to meet the requirements for group size and staffing set forth at Regulation .03 of this chapter. (Emphasis Added)

(2) Subsection 13A.16.08.03 entitled “Group Size and Staffing

- A. Assignment of Staff. One or more child care teachers shall be assigned to each group of children as needed to meet the requirements for group size and staffing set forth at Sections C-G of this regulation. (Emphasis Added)

Petitioner observes that these COMAR sections establish the State of Maryland’s requirements that all child day care centers must provide age appropriate programs and age appropriate curriculums that serve to promote the intellectual growth of the children in such facilities. The above “Program Requirement” regulations mandate that the licensed child day care facility prepare a daily “instructional program or lesson plan” appropriate to each age group in order to provide each child with both intellectual growth learning activities as well as physical activities as listed above. The above “Activity Materials, Equipment and Furnishings” regulations mandate that the licensed child day care facility provide the children in the child day care facility with appropriate age level materials and equipment that implement the Program Requirements quoted above (including those that promote the intellectual growth of the child). This section also calls for materials, equipment for the child’s exploration of subjects such as “art, music, language arts and science.” Petitioner also notes that the above “Group Size and Staffing” and “Child Supervision” regulations use the term “child care teacher” in referring to child day care facility staff rather than “day-care providers”.

The Hearing Examiner verified Petitioner’s citations to COMAR. These state regulations certainly lead one to conclude that much of the language used by Kiddie Academy in describing its programs on the internet is not limited to PEIs, in that it is also used by the State in regulating childcare. It thus appears that we have a proposed use which may fall under either or both special exception categories.

In order to decide the threshold issue raised by the opposition, it is necessary to ascertain, as best we can from this record, what the County Council’s intent was in authorizing special exceptions

for childcare facilities. The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

We have stated the rules governing statutory construction so often that only the most cursory repetition is necessary. Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

Section 59-A-2.1 of the Montgomery County Zoning Ordinance defines “Child day care facility” as follows:

Child day care facility: A dwelling or building in which child day care services are provided in accordance with all applicable state and county laws and regulations. For the purpose of this definition, a child is defined as a person whose age is 17 or under. A child day care facility is classified as follows:

* * *

Child day care center:

- a. *a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;*
- b. *a building in which child day care services are provided:*
 - 1) *for 13 or more children, or;*
 - 2) *which exceed the staffing limits of a family day care home, or a group day care home, or;*
 - 3) *for 24 hours a day provided that they are in conformance with state and local regulations.*

Preschool and kindergarten educational programs, subject to accreditation by the State, are permitted as an accessory use in all child care facilities. [Emphasis added.]

Of particular note is the last line of this definition, which specifies that “preschool and kindergarten educational programs” are permitted as an accessory use in all child care facilities.

Although the Code does not define the term “preschool and kindergarten educational programs,” it is clear that the Council did not intend child care uses to be devoid of educational aspects. Moreover,

the Council did not specify that a petitioner for a child care facility special exception which includes some educational programs had to file under both child care and PEI special exception categories.

In order to avoid a conflict between two statutory schemes, the courts have held that an attempt to harmonize them must be made. In *Maryland-National Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183, 909 A.2d 694, 700 (2006), the Maryland Court of Appeals held:

"[w]here statutes relate to the same subject matter, and are not inconsistent with each other, they should be construed together and harmonized where consistent with their general object and scope." *Gwin v. Motor Vehicle Admin.*, 385 Md. 440, 462, 869 A.2d 822, 834 (2005) [***13] (citations omitted); *State v. Ghajari*, 346 Md. 101, 115, 695 A.2d 143, 149 (1997). Therefore, "when two statutes appear to apply to the same situation, this Court will attempt to give effect to both statutes to the extent that they are reconcilable." *Ghajari*, 346 Md. at 115, 695 A.2d at 149 (citations omitted); *Mayor of Oakland v. Mayor of Mountain Lake Park*, 392 Md. 301, 316-17, 896 A.2d 1036, 1045 (2006).

Thus, our effort here should be to carry out the Council's overall objectives in permitting child care special exceptions with educational programs, while providing for a separate category of special exceptions to allow for PEIs. The distinction between child care and educational uses has become blurred over the years, as child care facilities add more and more educational components, but that addition is clearly desirable, as evidenced by the COMAR regulations. Unfortunately, the Zoning Ordinance has not caught up; however, as mentioned above, the Council could not have meant to discourage child care which provides an improved educational setting, and in fact their language demonstrates that they did not so intend.

The fact that schools often have enrollments that are much larger than 138 students, all of whom may descend on an area at once, is a very significant difference from the standpoint of impacts on the community. Also, extracurricular and enhanced curricular activities conducted by private schools (or those to whom they lease space) clearly were concerns of the Council in framing the PIE requirements which examine after-hour traffic impacts (Zoning Ordinance §59-G-2.19(b)). Those factors do not play a significant part in the proposed child care facility.

Although the proposed use may have some indicia of a PEI, its core mission is clearly that of a child care use. The most relevant differences between a PEI and a childcare facility are that PEIs are often much larger (both in physical plant and in enrollment); all of the children may arrive at once in a PEI; and a PEI may have a great number of after-hour programs involving many adults and children. That is why the PEI provisions have more protections for the community built into their language than do the provisions regarding child care special exceptions. Mostly, these provisions protect the community against incompatible traffic activities at all times, not just during peak hours.

In the subject case, the proposed child care center proposes a small physical plant compared to most schools (a one-story building with 9004 square feet of floor space); an expected staggered arrival of children; and much more limited after-hour activities. To achieve the objective of the Council in establishing rules for PEIs that will avoid “traffic incompatibility,” the Hearing Examiner has considered whether the proposed use will result in traffic incompatibility with this neighborhood. The ample evidence developed by queuing and delay studies by both sides, not just LATR and PAMR studies, demonstrates that the feared traffic incompatibility is unlikely to develop, as discussed at length in Part II. D. 5 of this report. Moreover, a condition has been recommended that would require further traffic studies before full enrollment is reached and that would have the Board retain jurisdiction to monitor impacts. The goals of both statutory schemes can thereby be realized without further delaying Petitioner’s application by requiring it to reapply under the PEI provisions or under both special exception headings.

Moreover, this application, as conditioned, would not violate other relevant terms of the PEI special exception conditions. For example, the 87 pupil per acre restriction (Zoning Ordinance §59-G-2.19(a)(4)) is satisfied by Petitioner’s proposal for 74.6 children per acre (138 / 1.85 acres). Due consideration has been given to structural compatibility, traffic impacts on residential streets, proximity to arterials, buffers for outdoor play areas, topography of the land to be used for the special

exception; the nature of existing development and zoning in the community; noise and types of physical activity; and adequacy of drop-off and pick-up areas.

While the community's concerns are understandable, it does not make sense to interpret the Zoning Ordinance as intending to put a severe cap on the educational approach to child care. Puffing about its curriculum by Kiddie Academy on its website is not the same as creating an actual school.

For all these reasons, the Hearing Examiner concludes that Petitioner may properly proceed with its application for a childcare facility, as distinguished from a private educational Institution.

B. Standard for Evaluation

The standard for evaluation prescribed in Zoning Ordinance § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “*the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.*” § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “*physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.*” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a child day care use. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse

effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

In this case, the Technical Staff suggested the following inherent characteristics associated with the child daycare use (Exhibit 119, p. 14):

- (1) buildings and related outdoor child care equipment;
- (2) parking areas;
- (3) lighting;
- (4) noise generated by children;
- (5) drop-off and pick-up areas;
- (6) outdoor play areas;
- (7) long hours of operation;
- (8) employees of the child care facility; and
- (9) vehicular trips to and from the site.

To this list of inherent characteristics, the Hearing Examiner would add signage, deliveries of supplies and trash pick-ups.

Technical Staff found three non-inherent characteristics of the proposed use (Exhibit 119, p. 14):

Staff finds the occasional weekend and extended evening hours, the two driveways located at the start of the only access road to 108 town house units, and the location of the driveways in close proximity to a school bus stop to be non inherent adverse effects created by unusual characteristics of the site.

Technical Staff found that “[t]he proposed scale of the building, the number of access points, the internal vehicular circulation system, and the onsite parking areas shown on the site plan for the child day care center are operational characteristics typically associated with a child day care center.” Staff therefore concluded (Exhibit 119, pp. 14-15):

The proposed child day care center is consistent with all applicable standards of the R-200 zone and satisfies all applicable requirements for grant of a child day care center special exception. Based on the traffic analysis, the vehicular and pedestrian

movement surrounding the site and on Catoctin Drive would be safe, adequate, and efficient. The lighting concept as depicted on the lighting plan is appropriate for the proposed use at the subject location.

With the recommended conditions of approval of the special exception, the inherent and non-inherent impacts associated with the proposed use do not rise to a level sufficient to warrant a denial of the application.

As discussed in Part II.E. of this report, the Hearing Examiner found that the whole vehicular access configuration in this case (*i.e.*, the combination of Catoctin Drive being the neighborhood's only vehicular access, its width, its proximity to the major intersection of Layhill and Bonifant Roads, and the proposed size of the operation) results in non-inherent adverse characteristics at this site. However, many changes made by the Petitioner and many conditions recommended by the Hearing Examiner, including follow-up traffic studies before full enrollment is permitted, will ameliorate likely adverse effects on the neighborhood in this case. Those that pertain to traffic have been discussed at length in Parts II. D. and E. of this report.

Petitioner has reduced the proposed enrollment from 158 children to 138 on site at any one time, and has reduced the number of proposed full-time-equivalent staff from 25 to 23. Petitioner also reduced the size of the proposed building from 9,728 square feet to 9004 square feet, and has significantly reduced the number of after-hour activities planned for the site. The heights of light poles have been reduced to residential scale.

As to school bus stops, the evidence at the hearing demonstrated that the alleged "proximity to a school bus stop" is not a major factor in this case. There are three school bus stops. The high school and middle school bus stops are located on Bonifant Road, near its intersection with Catoctin Drive. As discussed in Part II.D.5. of this report, the addition of sidewalks on the west side of Catoctin as part of this proposal would add to pedestrian safety, and part of the PAMR requirements may result in a sidewalk on the east side of Catoctin Drive, further improving the safety of children waiting for the school bus. The third bus stop is for elementary school children, and it is located

about 150 feet south of the proposed location of the southernmost access to the site (its egress driveway). Cars accessing the proposed daycare facility from outside of the neighborhood would have no reason to proceed beyond that point to the south because it leads to a dead end.

After carefully reviewing the entire record, the Hearing Examiner is convinced, as was the Technical Staff, that the requested use, if properly conditioned, will not have undue adverse effects on the neighborhood.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's documentary evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: Child day care facilities are permitted by special exception in the R-200 Zone pursuant to Zoning Ordinance §59-C-1.31(d).

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use would comply with the standards and requirements set forth for in Zoning Ordinance §59-G- 2.13.1, as detailed in Part IV. D. of this report.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and*

adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject site is located within the area covered by the 1994 Aspen Hill Master Plan. The Master Plan expressly recommends a child day care facility for this site. For all the reasons discussed at length in Part II. C. of this report, the Hearing Examiner finds that the proposed use is consistent with the applicable Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: Technical Staff concluded that the proposed special exception, as conditioned, will be in harmony with the general character of the neighborhood. Exhibit 119, p. 16. For the reasons set forth in Parts II. C. and D. of this report, the Hearing Examiner agrees with Technical Staff's conclusion. The evidence also supports the conclusion that public facilities will be adequate (1/15/10 Tr. 137 and 205-206), although that evaluation will be made by the Planning Board at subdivision.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in the previous answer and in Part II. of this report, the evidence supports the conclusion that, with the specified operational limitations and other conditions, the requested new use would not be detrimental to the use, peaceful

enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that the proposed use will not cause any unacceptable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Exhibit 119, p. 17. As noted in Part II. E. of this report, some noise and physical activity from children is an inherent characteristic of this kind of special exception. The conditions recommended by the Hearing Examiner will ensure that these adverse effects are sufficiently mitigated. The proposed lighting will not exceed 0.1 foot-candles along the side and rear property lines, as shown in the Lighting and Photometric Plans. This is in accordance with the lighting standards for residential zones set forth in Zoning Ordinance §59-G-1.23(h). There is no evidence that the proposed use will create any unacceptable vibrations, fumes, odors or dust. Based on this record, the Hearing Examiner finds that the proposed use will not cause any unacceptable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff found that “The proposed special exception will not increase the number, intensity, and scope of approved special exceptions in the area enough to affect the area adversely or alter its commercial/residential nature. Exhibit 119, p.18.

Moreover, by definition, *“Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.”* As previously stated, the proposed use is consistent with the recommendations of the Master Plan.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence summarized above supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. In fact, the addition of needed child care capacity is beneficial to the general welfare of the area.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

(A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

(B) *If the special exception does not require approval of a preliminary plan of subdivision, by the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: As determined by Technical Staff (Exhibit 119, p.18), the special exception sought in this case would require approval of a preliminary plan of subdivision. Therefore, the public facilities review will be done by the Planning Board at subdivision, and approval of the Preliminary Plan will be a condition of this special exception.

Nevertheless, Petitioner's traffic engineer, Mickey Cornelius, did do a traffic analysis and found that the Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR) would be met, and that queues and delays at the relevant intersections would not be inordinate, as discussed in Part II. D. 5 of this report.

Technical Staff agreed, and the matter will be reviewed at Subdivision. The Hearing Examiner finds that Petitioner has made a sufficient showing at this stage that public facilities will be adequate.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence in this record, as discussed in Part II. D. 5. of this report, the Hearing Examiner concludes that the proposed use, as conditioned, would not reduce the safety of pedestrian or vehicular traffic.

D. Specific Standards: Child Day Care Facility

The specific standards for a child day care facility are found in Code § 59-G-2.13.1. The Technical Staff report and the evidence of record in this case provide sufficient evidence that the proposed child day care facility use would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.13.1. Child day care facility.

- (a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*

(1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas and other uses on the site;*

Conclusion: A site plan (Exhibit 223(d)) has been submitted showing buildings and other facilities, as required.

- (2) *parking is provided in accordance with the Parking Regulations of Article 59-E.*

The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in Section 59-E-3.7 is not necessary because:

- (A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required; or*
- (B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: Zoning Ordinance §59-E-3.7 requires, “For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is one space for every six children.” Prior to the reduction in proposed enrollment and staff, Technical Staff determined that, to comply with Zoning Ordinance Article 59-E, 52 parking spaces were required. Exhibit 119, p. 12. With these reductions, only 46 spaces would be required ($138/6 = 23$ spaces for discharge and pick up plus 23 staff spaces). As discussed in Part II. D. of this report, Petitioner’s site plan continues to provide for the 52 spaces, six more than are required. Five of those spaces would be compact spaces, pursuant to the waiver requested by Petitioner and recommended by Technical Staff. For the reasons discussed in Part II. D. 6. of this report, that waiver should be granted.

- (3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: As discussed above, an adequate area for the discharge and pick up of children has been provided, although the daycare provider requires that all parents park their vehicles in the parking area and walk their children to and from the building.

(4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as a condition of approval for this special exception; and*

Conclusion: Petitioner submitted the required affidavits in Exhibits 129, 170, 196 and 197.

(5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surrounding properties from any adverse impacts resulting from the use.*

Conclusion: As stated above in the discussion regarding the general standards for a special exception, the use, as conditioned, will be compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity.

(b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a), and the following additional requirements:*

(1) *a landscaping plan must be submitted showing the location, height or caliper, and species of all plant materials; and*

Conclusion: An appropriate Landscaping Plan was submitted as Exhibits 223 (e),(f) and (g).

(2) *in the one-family residential zones, facilities providing care for more than 30 children must be located on a lot containing at least 500 square feet per child. The Board may reduce the area requirement to less than 500 square feet, but not less than 250 square feet, per child if it finds that:*

- (A) *the facility will predominantly serve children of an age range that require limited outdoor activity space;*
- (B) *the additional density will not adversely affect adjacent properties;*
- (C) *additional traffic generated by the additional density will not adversely affect the surrounding streets; and*
- (D) *adequate provisions for drop-off and pick-up of students will be provided.*

The Board may limit the number of students outside at any one time.

Conclusion: Petitioner proposes a maximum student enrollment of 138 on campus at any one time.

Since the site contains 80,802 square feet (1.85 acres), it more than meets the required minimum of 500 square feet per child ($80,802 / 138 = 585.52$ square feet per child).

(c) *The requirements of Section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in:*

(1) *a structure owned or leased by a religious organization and used for worship;*

(2) *a structure located on premises owned or leased by a religious organization that is adjacent to premises regularly used as a place of worship;*

(3) *a structure used for private parochial educational purposes which is exempted from the special exception standards under Section 59-G-2.19(c); or*

(4) *a publicly owned building.*

Conclusion: This section is not applicable.

E. Other Applicable Standards

Section 59-G-1.23. General development standards.

(a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The following chart from the Technical Staff Report (Exhibit 119, p. 12), demonstrates compliance with all applicable development standards:

Current Development Standard: R-200	Standard	Proposed
Minimum Lot Area	20,000 sf	1.86 ac
Minimum Lot width:		
• @ Front building line	100 ft	323.90 ft
• @ Street line	25 ft	54.74 ft
Minimum Building Setback:		
Front	40 ft (EBL)	40 ft
Side		
▪ One side	12 ft	12 ft
▪ Sum of both sides	25 ft	25 ft
▪ Rear	30 ft	30
Maximum Building Height	50 ft	30±
Maximum Building Coverage	25%	12% (16,046 sf)

(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.

Conclusion: As previously discussed, Petitioner will be in compliance with all applicable parking standards.

*(c) Minimum frontage * * **

Conclusion: Not applicable, since none of the listed uses are involved and no waiver is being sought.

(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

Conclusion: The Planning Board approved Petitioner's Preliminary Forest Conservation Plan (PFCP). Exhibit 195. Since this case must go through subdivision, the Planning Board will review the final forest conservation plan at that time. The following condition has been recommended in Part V of this report:

Petitioner must comply with the conditions of the revised Preliminary Forest Conservation Plan, Exhibit 116(g), until approval of the Final Forest Conservation Plan by the Planning Board, after which time Petitioner must comply with the terms of the Final Forest Conservation Plan.

(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: Water Quality Plans are used in special protection areas (SPAs), as specified in Zoning Ordinance §59-A-2.1. Since Technical Staff did not indicate that this site is in an SPA, this provision is inapplicable to this case.

(f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: As discussed in Part II.D. of this report, Petitioner seeks to erect signs for which sign variances and permits will be required. Moreover, the Hearing Examiner found the requested size and quantity of signs to be excessive for this residential neighborhood.

He therefore recommends the following condition in Part V of this report:

No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, where required, and a copy of these documents are filed with the Board of Appeals. Signage must be limited to black and white signs, including one monument sign, one wall sign with Petitioner's logo and one sign over the entrance with their motto "Community Begins Here," as depicted Petitioner's elevations (Exhibit 138). The monument sign will be restricted to five feet in height and seven feet in width, as measured from the outside of the support structure. The signs may be illuminated at the times specified in the revised statement of operations (Exhibit 223(a)).

(g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: As noted by Technical Staff (Exhibit 119, p. 13),

The exterior of the proposed building appears residential and incorporates several features of a single-family detached home including a residential type entrance, windows and low roofing. The surrounding properties include a variety of uses including residential, commercial and institutional uses with varying architectural designs and elements. Given the nature of the zoning for the subject site (R-200), the adjoining residential uses to the southeast and west of the site, the adjacent Bank building and the commercial developments to the north and northwest, the proposed design of the building will be appropriate and relates well with the varying characteristics of buildings in the area.

It will thus be compatible with the neighborhood.

(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent*

residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.

(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

Conclusion: As discussed elsewhere in this report, the lighting will not cause glare on adjoining properties, nor exceed the 0.1 foot-candle standard at the side and rear property lines.

Section 59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: As discussed above, the new structure will be designed to be compatible with its surroundings, and will be appropriately landscaped and screened. It will also have suitable pedestrian circulation.

Based on the testimony and evidence of record, I conclude that, with the recommended conditions, the plans proposed by Petitioner meet the specific and general requirements for the proposed use, and that the Petition should be granted, with the conditions recommended in the final section of this report.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition S-2710, which seeks a special exception for a child day care center on property located on the R-200 zoned portion of Parcel A, Block C, Bel-Pre Manor

Subdivision, at Bonifant Road and Catoctin Drive, in Silver Spring,, Maryland, be ***granted*** with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. Petitioner is granted a waiver to allow five of the parking spaces on the southern end of the site labeled on the site plan as compact-car spaces.
3. Since the proposed use will require subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9), approval of this special exception is conditioned upon approval of a preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must request modification of these special exceptions from the Board of Appeals.
4. Petitioner must comply with the terms of its revised Site Plan (Exhibit 223(d)), its Landscape Plans (Exhibits 223(e), (f) and (g)); and its Lighting and Photometric Plans (Exhibits 148(e) and (f)).
5. Petitioner must create a Community Liaison Committee (CLC) to discuss and address issues of concern to Petitioner and/or the community. The CLC shall consist of Petitioner's representative, up to two representatives of BPHOA and representatives from any nearby civic association or homeowners association wishing to participate. If a new People's Counsel has been appointed, he/she will serve as an *ex officio* member of the CLC. The CLC is intended to provide a means and mechanism for communication and interaction between the daycare center and its neighbors. The CLC must have an initial organizational meeting prior to the start of construction, and meet three times a year, thereafter. Minutes of meetings must be taken and distributed by Petitioner or its designee, and the CLC must prepare an annual report to be submitted to the Board of Appeals, which

should include these minutes. There will be no requirements for a quorum, voting, or specific attendance. There should be a traffic monitoring report from the facility's transportation coordinator evaluating the traffic situation, including during special events, and that report should attach the follow-up traffic study required elsewhere in these conditions.

6. No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, where required, and a copy of these documents are filed with the Board of Appeals. Signage must be limited to black and white signs, including one monument sign, one wall sign with Petitioner's logo and one sign over the entrance with their motto "Community Begins Here, " as depicted Petitioner's elevations (Exhibit 138). The monument sign will be restricted to five feet in height and seven feet in width, as measured from the outside of the support structure. The signs may be illuminated at the times specified in the revised statement of operations (Exhibit 223(a)).
7. Petitioner must comply with the conditions of the revised Preliminary Forest Conservation Plan, Exhibit 116(g), until approval of the Final Forest Conservation Plan by the Planning Board, after which time Petitioner must comply with the terms of the Final Forest Conservation Plan.
8. Petitioner must comply with the stormwater management plan ultimately approved by DPS and adopted at subdivision, and must obtain and comply with sediment and erosion control permits.
9. Petitioner must comply with the terms of its Revised Statement of Operations of April 28, 2010 (Exhibit 223(a)).
10. Petitioner must comply with its revised Transportation Management Plan (Exhibit 209(g)). Its regulations must be strictly monitored and enforced in accordance with the

TMP. If changes in the TMP are made at subdivision, Petitioner must request a modification of this special exception from the Board of Appeals to so reflect.

11. The number of full-time equivalent employees may not exceed 23 on site at any given time.
12. Petitioner must not have more than 138 daycare children on site at any one time.
13. Petitioner must comply with all Maryland State and Montgomery County licensure requirements and standards for the operation of a child day care facility.
14. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioner is bound by the Affidavits of Compliance submitted in connection with this case, Exhibits 129, 170, 196 and 197, in which Petitioner and the franchisee operators, Milena and Garrett Mattingly of AMG, LLC, certified that they will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavits as a condition of approval for the special exception.
15. In no event may a child be dropped off before a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
16. All children must be under the direct supervision of a staff member at all times, both inside and outside the building.
17. The Petitioner shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.
18. The Petitioner shall maintain the grounds in a clean condition, free from debris, on a daily basis.
19. Petitioner's contract with its patrons must specify that users of the childcare facility shall not park on the neighborhood streets while dropping off or picking up their children.

20. During construction of the daycare facility, Petitioner must ensure that construction equipment and trucks are not parked off site so as to interfere with the free flow of traffic on Catoctin Drive, and shall adhere to all requirements of the County's noise ordinance.
21. The Board will retain jurisdiction to monitor impact of operations upon the community. During the first year of operations, Petitioner may not exceed an enrollment of 100 children on site at any time. Towards the end of that period, Petitioner must have a traffic study done to determine delays and queuing at the intersection of Catoctin Drive and Bonifant Road during the three-hour peak weekday periods of two typical days. The results of the traffic study, which should indicate the number of children in attendance on each studied day, must be shared with BPHOA and filed with the Board of Appeals. The Board will thereafter schedule a work session to determine whether conditions are such that Petitioner may increase the number of children on site at any time to 138, the full number requested by Petitioner.
22. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: October 22, 2010

Respectfully submitted,

Martin L. Grossman
Hearing Examiner